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ABSTRACT

This material provides a program to instruct secondary-level students in the political, governmental, and legal process and to encourage active student participation in these processes. The materials draw heavily upon community cooperation as a base for practical learning. Part of a year-long curriculum program, this unit examines individual rights and civil liberties. The unit concentrates on freedom of speech and expression as intricate parts of the study of the court system, criminal procedures, and the basic foundation of law. Case studies are presented whereby students analyze each decision rendered. Learning activities include mock trials, simulation, role playing, field study, problem solving, issue analysis, and research. Chapters one through four, respectively, (1) introduce students to the foundation of law through a series of classroom activities designed to stimulate individual assessment of both values and concept of the need for laws, plus a basic understanding of the criminal procedures; (2) provide an introduction to due process and judicial review through the use of historical case studies; (3) examine historical aspects of expression, seditious speech, public and private forums, and symbolic speech; and (4) present resource material available on legal education, including selected sections of the Constitution, diagrams, additional teaching strategies, legal glossary, and how to find legal cases. A bibliography concludes the document. (Author/JR)

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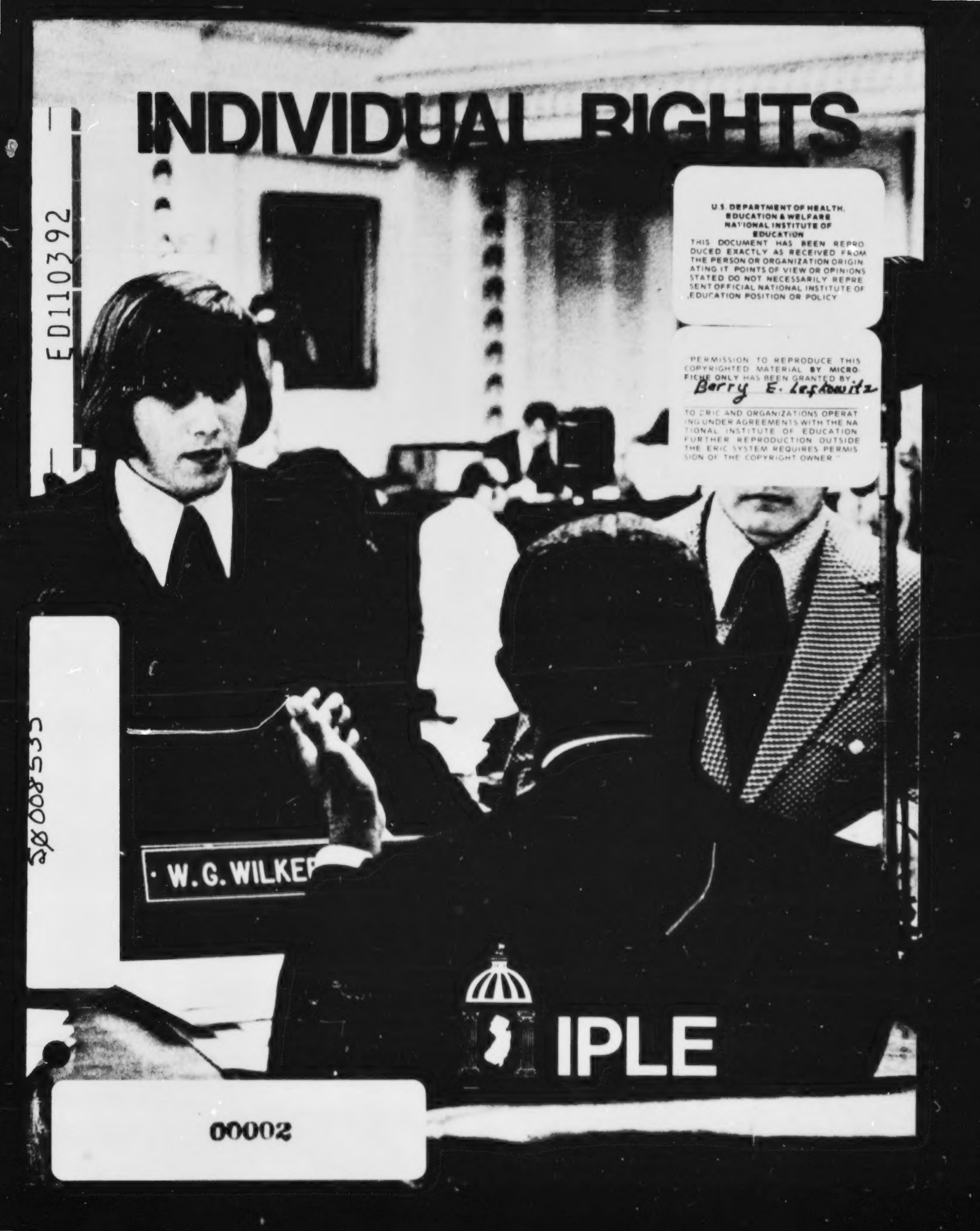

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INSTITUTE FOR POLITICAL AND LEGAL EDUCATION

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A RESOURCE MANUAL FOR TEACHERS AND STUDENTS

Prepared by

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March 1975

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On behalf of the Department of Education, State of New Jersey, I wish to bring the Institute for Political and Legal Education to the attention of educators throughout the nation. The program has made a significant contribution to the education of high school students about the American political, governmental, and legal process and thus should be of interest to educators, parents, and students.

Dr. Fred G. Burke
Commissioner of Education
State of New Jersey

The Institute for Political and Legal Education was developed through the cooperative efforts of the Institute staff, educators in local New Jersey districts, and the staff of the Office of Program Development, Division of Research, Planning, and Evaluation/Field Services, the Department of Education, State of New Jersey. The political and legal materials were developed between 1971 and 1974 with funding from the Elementary and Secondary Education Act, Title III.

In 1974 the political education program was validated as successful, cost-effective, and exportable by the standards and guidelines of the United States Office of Education. As a result the program is now funded through ESEA, Title III, as a demonstration site to provide dissemination materials and services to interested educators.

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DEDICATION

This guide is dedicated to three groups that have had a tremendous influence on the success of the Institute for Political and Legal Education:

To the Board of Directors, which has served unselfishly and with much dedication and comprise some of the finest persons with whom I have become associated in a professional relationship.

To the Teacher-Coordinators of the Institute for Political and Legal Education program, who have dedicated themselves to excellence in programming. They, together with the Institute students, are responsible for the fine reputation of the project.

And, to the Educational Improvement Center of South Jersey for their professional assistance and guidance.

This manual is also dedicated to three important individuals, Ronald Maniglia, Dotti Donovan, and Helen Klubal, and a special tribute is extended to Judy, Tova, and Chava.

Barry E. Lefkowitz
Director

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LAW

What a subject is this in which we are united – this abstraction called the Law, wherein, as in a magic mirror, we see reflected, not only our own lives, but the lives of all men...disclosing every painful step and every world-shaking contest by which mankind has worked and fought its way from savage isolation to organic social life.

– Oliver Wendell Holmes

If we desire respect for the law, we must first make the law respectable.

– Louis D. Brandeis

It is the spirit and not the law that keeps justice alive.

– Earl Warren

A law is valuable not because it is law, but because there is right in it.

– Henry Ward Beecher

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FREEDOM OF SPEECH

I disapprove of what you say, but will defend your right to say it.

– Voltaire

Free speech is to a great people what winds are to oceans and malarial regions, which waft away the elements of disease and bring new elements of health; and where free speech is stopped, miasma is bred, and death comes fast.

– Henry Ward Beecher

Every man has a right to be heard, but no man has the right to strangle democracy with a single set of vocal chords.

– Adlai E. Stevenson

Better a thousandfold abuse of free speech than denial of free speech. The abuse dies in a day, but the denial stays the life of the people, and entombs the hope of the race.

– Charles Bradlaugh

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PREFACE

A new constituency has been created in America following ratification of the 26th Amendment to the United States Constitution which lowers the voting age to eighteen.

Surveys across the nation of students approaching the age of eighteen have revealed similar and disappointing results. The majority of high school students do not know their local, state, or federal representatives; do not know how to register to vote; do not understand the Bill of Rights; and express disillusionment and frustration with the system.

There is an obvious need for an awareness and understanding of the political, governmental, and legal process. The logical approach for correcting the situation is education within the school system.

The function of the Institute for Political and Legal Education (IPLE) is to provide a program to instruct secondary level students in the political, governmental, and legal process. Through IPLE, students demonstrate a significant positive increase in their knowledge and reveal an inclination to participate actively in the political process and law-related fields.

A unique feature of the program lies in the view of the total community as a classroom since it attempts to utilize all resources in the community and State as a real and practical base for learning. Students are out of school approximately thirty-five days per school year, involved in field study and interning. Working in the community provides students, through experiential learning, an opportunity to apply the skills acquired in the classroom. This can be accomplished at the local, county, and/or state levels.

Through surveys, problem solving, issue analysis, research, simulations, field study, and interning, students eventually possess the ability to initiate projects which affect their community in a positive manner.

The year-long curriculum is subdivided into three areas of concentration, alterable by the interests and selections of the students and teacher. An integrated combination of innovative informational and instructional manuals is utilized within each unit of study, along with simulation gamings, surveys, projects, audio/visual materials, and appropriate interning. In addition, individual classroom, regional, and state-wide training conducted by professional experts provides participants with an active overview of the unit.

The *Voter Education* unit includes the process of issue analysis, canvassing, and registration with insights into media publicity/propaganda techniques, and election strategies. Voting reform, rights and procedures, party structure, and the electoral college are examined intensively. An optional political assembly and simulated election are highlighted with historical review, candidate speakers, and local party campaigning. Activities which are encouraged during the unit include a voter registration drive in and out of school; campaigning for actual candidates (working in campaign headquarters, telephone canvassing, door-to-door canvassing); working as challengers at an election; organizing transportation and/or babysitting for election; and conducting survey polls for election in and out of school.

The *State Government* unit examines the structure and function of the state, county, and local levels intertwined with previous unit issues such as environment, housing, and transportation. Included are policy formation, lobbying, media techniques, sociological surveying, and value orientation. Simulation gaming is used for the purpose of revealing to the student the decision-making process of governmental bodies. In

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addition, students learn the operation of intergovernmental communication and are provided with a practical knowledge of labor-management relations. Student awareness of the passage of laws not only is experienced in out-of-school interning at the State Legislature and/or a professional lobbyist's office but also is simulated at a three-day Model Congress.

The *Individual Rights: Freedom of Expression – Fair Trial v. Free Press* unit concentrates on the freedom of speech (including expression) and fair trial v. free press as intricate parts in the study of the court system, criminal procedures, and the basic foundations of law. Case studies are presented, e.g., *Roth v. United States, New York Times v. Sullivan,* whereby students analyze the decision rendered. Students are expected to formulate their own law, evaluate its precision, jurisdiction, limits of enforcement, and possible alternatives. Included is the *Mock Trial: Tinker v. Des Moines,* a simulation activity where students assume roles of individuals associated with this freedom of expression case. Students learn, through role playing, the process of a District Court evidentiary hearing and a Supreme Court session. Field study or interning might include the Bar Association or the Public Defender's Office.

Activities and projects throughout the curriculum have been designed to provide students at lower, middle, and upper ranges of ability the opportunity to overcome challenges at their appropriate level. In this way, more flexibility is afforded to the teacher in selecting curriculum options.

The key to IPLE's popularity with students, teachers, administrators, and community leaders is its foundation in the real world of political action. Students do not watch an election from the sidelines – they are a part of it! They do not memorize the names of Supreme Court justices – they actually see the court system in action!

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FOREWORD

Reflections on Law Studies in the Schools Today [1]

by Isidore Starr
Former Professor of Education, Queens College

When did law-related education really begin? If you give this question some thought, you may agree with me that law-related education probably began at that great moment in history when Moses laboriously climbed to the top of that mountain, met the distinguished Party of the First Part, had an extended conference, and when he returned, became the first law reporter in history. As a result of that Conference there was a tremendous multiplier effect throughout the world, a development described as the greatest contribution of Western civilization.

Our approach will be to arrange the aims into four traditional categories: knowledge and understanding, skills, attitudes, and appreciations.

With reference to knowledge and understanding, it seems to me that there are five threads which weave their way through the delicate and fragile fabric of American life. These threads or major ideas are: liberty, justice, equality, property, and power. The dimensions of each of these ideas can and have been explored through history, through economics, through political science, through sociology, through anthropology, and through philosophy. I would like to suggest to you that one of the most effective ways of looking at each of these ideas is through the perspective of the law.

For teaching purposes I know of no better definition of liberty than the First Amendment Freedoms. For me, as a teacher, there is no better explanation of due process of law or criminal justice than that *delineated* in Amendments IV, V, VI, and VIII of the Consitution of the United States.

The idea of equality is also engraved in our Constitution, but not by way of a simple dictionary definition. Amendments XIII, XIV, and XV speak to us in the words of racial equality. Amendment XIX opens the door to sexual equality in politics. This may be extended in the very near future by the Equal Rights Amendment. Amendments XXIII and XXIV speak of political equality in the District of Columbia and the abolition of the poll tax, while the 26th Amendment extends suffrage to American youth. To all these dimensions of equality the Supreme Court has added its famous one-man, one-vote rulings, which should read today as one-person, one-vote rulings.

With reference to property, the idea is mentioned in Amendments V and XIV. The nature and uses of property in our society must be examined with our students because they live in a property-minded society. The relationship today between the reality of economic bigness and the theory of competitive capitalism must be explored because this development has law-based implications. In addition, the uses of property today are running into the paths of the guardians of our ecological environment with the result that we are faced with a confrontation between the right to property on the one side, and the quality of life on the other.

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[1] Speech at Regional Conference on Law-Related Education, Philadelphia, Pennsylvania, May 1973, reprinted in *"Reflections on Law Related Education,"* Working Notes No. 3, American Bar Association, Chicago, Illinois, 1973.

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The fifth major idea is power, and if the founding fathers of this country knew anything, they knew what it meant to be confronted with power. They respected power, feared its abuse, and decentralized it. Power has been decentralized in our Constitution in the form of the division of powers between federal government and state, and separation of powers among the legislative, executive, and judicial.

The inevitable by-product of a law-oriented inquiry into the dimensions of these five major ideas is the asking of important questions and the explorations of significant answers. For example, how do we Americans differentiate liberty from license? Is there a law for the rich and a law for the poor? The more searching question is: Is there a law for the rich and a law for the poor and a law for the middle income? Is the adversary system of this country obsolete? Is there a better method of arriving at the truth? Is the decentralization of powers which was incorporated into our Constitution passing into the limbo of history? Are our states obsolete entities? What is happening to our system of separation of powers and checks and balances? Is the police power of the state being blunted by the power of property? What happens when a ruling of our High Court, which is the supreme law of the land, is confronted by local, state, or regional resistance? We have to examine what happens when this occurs and then we should ask the question: What should be done about this resistance? These are some of the thoughts that ought to be uppermost in our minds as we look at these five major ideas...

It has been my experience that the introduction of law studies in the schools adds a sophisticated dimension to skills development. Law materials, by their very nature, force students and teachers to analyze the issues in value conflicts. If law-related education is taught properly the students are not lawyers. They become American citizens who begin to look at value conflicts a little differently than they had. For example, what happens when an individual confronts another individual in an ideological confrontation, or an individual confronts a group, or the group confronts an individual, or an individual confronts the government? Each of these confrontations involves a conflict of values. The conflict is very seldom the conflict between a good value and a bad value. The conflict is usually between a good value and a good value, and how do we resolve that? Here is an opportunity for thinking in depth.

In addition, case studies develop in us skills in briefing cases, in looking at a case and deciding what are relevant facts against non-relevant facts and what are relevant laws against non-relevant laws? What are the plaintiff's arguments and the defendant's arguments? What are the issues in the case? What is the decision? What are the opinions supporting the decision? And lastly, of what significance is this decision? Our students, and I suppose many of us too, feel that when the Supreme Court hands down an opinion – that ends the case. I would like to suggest that, more often than not, that begins another case. For example, the *Gideon* case held that an indigent defendant accused of a serious crime is entitled to the assistance of counsel. What kind of counsel is he going to receive under our system? Skill in analyzing the chain reaction of problem-solution-problem is invaluable in breaking through the jungle of data which impinge on our senses.

Case studies in law materials develop skill in reasoning. Most of us are acquainted with the traditional analytical skills of the inductive method and the deductive method. Charles Sanders Pierce, in one of his great essays, speaks of the abductive method...

Paul Freund, who has done some of the most perceptive writing in law-related education, has published an essay on inquiry skills which merits the attention of all who are involved in law studies. Entitled "The Law and the Schools," the essay appears in *The Law and Justice*. Freund distinguishes seven modes of thought or legal reasoning which can sharpen the thinking of students. One is dialectical thinking, and the law lends

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itself especially to that. Justice Holmes, it is said, had the habit of entering his office each morning, throwing his hat on the rack and challenging his law secretaries with the teaser: "State any proposition and I will deny it." This is one way to develop analytical skills.

There is contextual thinking. What is the cause of an event? There is ethical thinking. What is fair? What conduct is just? What conduct is unethical? There is general thinking, or the organic development of an idea. Many of our students tend to think of the privilege against self-incrimination as the shield used by Communists and racketeers. To understand the privilege against self-incrimination we have to engage in some genetic thinking about how this came into being, and the blood, toil, sweat, and tears that accompanied its emergence as a principle. Then there is associative thinking. I like especially this little quote from Freund, who says, "We live by metaphor, we advance by simile, and we rise by concept." We have such tantalizing phrases in the law as "a wall of separation between church and state." "Ignorance of the law is no excuse," "the reasonably prudent man," and "a government of laws and not of men." Each of these has little meaning unless it is subjected to the scalpel of reason so that its thrust is measured by the mind.

Then comes institutional thinking or the legal process, as it unfolds in the legal forum. And last and perhaps most important, according to Freund and according to myself, is self-critical thinking. I can best explain self-critical thinking by telling you my favorite story. Up to this point I have quoted freely from Paul Freund. This story is my contribution to the nature of self-critical thinking. This is a story of a professor who gave the same final examination each semester. His course was very popular. Students flocked to it in great numbers and for a time they got their predicted A. Then there came a time in the life of the professor and his students when his grades began to follow a bell-shaped curve and some of the students began to fail. One of the students, quite upset by failure, went up to the professor and said, "Look, sir, the day I took your course I knew the final exam. One of the A students in the past helped me to prepare for this final exam. He got an A in the past. How is it that you failed me today?" The professor looked at him and said, "Young man, all that you seem to know is that each semester I ask the same questions on my final exam. What you do not seem to understand is that each semester now I change the answers." And that is one of the great stories in law and in social studies. We do change the answers to the "big questions," "the cosmological questions of our time," the questions that call forth the nature and meaning and scope of liberty, justice, equality.

There is another type of skill that we can develop in teaching law-related materials, and that is skill in role-playing. Role-playing of a very important sort takes place in moot court cases and mock trials. Simulation adds the dimension of emotional involvement to intellectual analysis.

There are forums and debates, which require skill. There are symposia and mock legislatures in which our students can engage, as well as mock episodes like the Xanadu crisis, a complicated episode involving separation of powers. There are other exercises like rewriting the Constitution of the United States, or if you are less ambitious, rewriting the Bill of Rights in order to bring it up to date.

There is a very rich literature in the law which we can use with our students. *Lord of the Flies*, the great Japanese Story, "Rashomon," in which a group of people see the same episode quite differently, *To Kill A Mocking Bird*, and *The Story of the OK Corral*. There are many interesting tales which we can incorporate into the literature of the law to stimulate the flow of intellectual and emotional juices.

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In case law there are some memorable quotations, some great quotations which lend themselves to skill development. The simple ones you all know. Your right to swing your arm ends just where the other man's nose begins. Freedom of speech does not include the right to yell fire falsely in a crowded theater. Again from Holmes: "If there is any principle of "the Constitution that law imperatively calls for, it is the principle of free thought, not free thought for those who agree with us, but freedom for the thought we hate." There are many others that will sharpen the mind and, at the same time, lead the student into the domain of attitudes.

So now a word about attitudes. I said a little something about knowledge and understanding and skills. The attitude developed by law studies should be one of honest inquiry. Many of the educators in this audience know that the word inquiry is being used today with "systematic ambiguity." In the name of inquiry, many students are being led through a complicated series of exercises to foregone conclusions. This is not inquiry. Law-related education, like all effective education, rejects that. By inquiry, or critical thinking, or reflective thought I mean an honest search for answers to really important questions – important to students and to ourselves. There are all kinds of attitudinal predilections or positions that we can study by using cases. For example, we can present students the facts of a case, ask them to resolve it, then have them compare their decision to that of the court. Or we can give them the decision and ask them whether in the interest of liberty, justice, or equality the decision is justified.

Honest inquiry, as I view it, is a never-ending search for viable alternatives in real-life situations. Controversial issues, when law-related, force each of us to face issues realistically and honestly. Inquiry is an attitude that recognizes that all of life is the story of never-ending value differences, forcing us to live with questions that defy instant solutions. The great equations of life and of the law seem to me to be the following: My right and your need, liberty and equality, free press and fair trial, the right of property and the quality of life. Some of these rights and values are on a collision course. We know that in many neighborhoods peaceful resolution of disputes is on a collision course with civil disobedience and even violence. All of these equations are, for me, the calculus which forces us to think in terms of priorities and hierarchies of values. That is part of the great story of the law. We have to make decisions. We cannot wait for the long run. We make decisions the best way we can, provided we have some conception of what it means to be living in a country of liberty, justice, equality, property, and power.

And now for the fourth of the categories – appreciation. I use appreciation a little differently from my colleagues. Appreciation to me means getting under the skin of your students, because many of our students today are turned out, turned off.

Our students, in view of the fact that many of them or most of them are the television generation, are acutely aware of the human condition as it has been portrayed on the news. This is a condition of creeping corruption in our lives, a corruption that has found its way not only into members of our families, but the people in high offices. Corruption and lawlessness are facts of life, and are very distressing, especially today. What does the law offer us and our students, many whose lives are built around despair about the future? I have no answer to this problem, but I would like to suggest something to think about. We must explore with our students the causes of lawlessness in our society. There are reasons for it and there are consequences for each of us if we permit lawlessness to become the law of the land. As one newspaper commentator recently said, "America is passing from the age of the common man to the age of the common crook."

Law materials can show the use of law as a possible tool in the confrontation and clarification of society's problems. For example, the law has done some remarkable things, which we tend to forget. It is the law that has exposed and will eventually try the lawless. We can show our students in a variety of ways how the

law has been grappling with contemporary issues with varying degrees of success. For example, we are developing in this country a law of poverty. It is something new. We are developing a law of ecology. That is new too. Civil rights cases and the laws are not so new, but the law is helping us to clarify the questions which we should be asking.

Criminal justice was transformed by the Warren Court, and those principles of procedural due process are still with us. One-person, one-vote law is being modified, but that also is still with us. The decisions relating to the juvenile accused is an emerging field of law. Education law is being clarified in a variety of ways. There are a multiplicity and variety of cases dealing with students going to the federal courts today. The law has been, in my judgment, a constructive and positive influence on the implementation of American ideals. The picture is a mixed one. We have to explore the various dimensions with our students.

The use of law materials furnishes an outlet for students' needs to do something constructive. By appreciation I mean doing something about what you believe. In some communities students are being urged to use the law to change the law. For example, some students in New Jersey are engaged in realistic activities, using the instruments of the law to effect constructive change.

A principle that runs through our history is that ours is a government of law and not of men. An appreciation of the rule of law as a means of approaching society's problems may mean that recourse to the courtrooms and legislative chambers should have priority over recourse to the street. Recourse to the street should be a last resort, and it becomes a last resort for those who understand the uses of the law as instruments for societal change.

The schools cannot escape the clash of value systems and ideas which resound in our society. We cannot escape and none of us is a bystander. Educators, lawyers, criminal justice officials, police, the community, students at law school and elementary, junior and senior high, must work together to devise ways of bringing the great issues of our times into the classrooms and into the schools. One way to accomplish this is to utilize the many materials and resource people we have available in the law as catalysts for probing value conflicts. The use of the law, in its best sense, seeks to reconcile the past with the present, continuity with change, and, as the Chinese say, – since it is now respectable to quote the Chinese – the use of the law helps us to reconcile yin and yang. The study of law even helps us to produce a generation of citizens who are users of the law, because they understand the nature and the potential of the law and its great accomplishments, both in the past and in the future.

By way of conclusion, I think I have found the proper ending to these remarks. Forty years ago Justice Holmes said something that has a flavor reminiscent of John Dewey. Since both can be considered great educators and since the thought is representative of both, it is fitting to end this talk by quoting from Holmes: "Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end and to persist in affirming the worth of an end is to make an ideal. We all, the most unbelieving of us, walk by faith. We do our work and live our lives not merely to vent and to realize our inner force, but with a blind and trembling hope that somehow the world will be a little better for our striving."

Perhaps all of us involved in law education will marshall our forces to make this world a little more civil, a little more dignified, a little more sensitive to liberty, justice, and equality, and hopefully, a little more honest.

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INTRODUCTION

There exists a critical need for law-focused education in the schools. Students constantly inquire into the relationships between government, particularly the court system, and their individual rights as citizens. How can the educational system address the problem in the midst of ever-changing sociological, economic, and political circumstances in a satisfactory manner to the students awainting answers?

In an attempt to solve the problem, this manual, *Individual Rights*, the first part of the third unit of study in a year-long social studies curriculum, presents the basic foundations of law and the concept of freedom of expression guaranteed under the Bill of Rights. The second part of the unit is the manual *Fair Trial v. Free Press*.

The inquiry-oriented approach presented herein demands active participation of students thus developing analytical and evaluative skills in addition to fundamental knowledge. Directed discussion, role-playing simulations, and debate are emphasized.

Pre-planning will increase the effectiveness of each section. Since an inquiry approach is essential, questions should be of a nature that analyze ("why," "how would"), evaluate, compare or contrast, and describe.

The design layout of *Individual Rights* provides maximum flexibility. The curriculum material is divided into self-contained sections with no specified time limitations for presentation. Each section contains four parts. *Directive* indicates the behavioral objectives to be acquired. *Informat* provides introductory information in a simplified, condensed fashion for easy scanning. *Motivat* describes student activities, inquiry methodology, and interning recommendations. Finally, *Reference* explains sources of additional material and suggests alternative uses of the curriculum section. For additional information and assistance, the Resource Material should be used by both the teacher and students. Material to be used by the students appears on blue-tinted pages.

Lastly, this is a learning experience and no one expects an instructor to possess the legal expertise to answer every point discussed. As an overall objective, speakers, workshops, and interning activities are encouraged as a critical component of instruction.

00020

CHAPTER I

FOUNDATIONS OF LAW

INTRODUCTION

This chapter introduces students to the foundations of law through a series of classroom activities designed to stimulate individual assessment of both values and concept of the need for laws, plus a basic understanding of the criminal procedure.

Through the *Value Survey* students will have an opportunity to react to critical topics associated with legal rights and responsibilities.

Why Do We Have Laws? provides the base for a general discussion where students are requested to formulate their own law and evaluate its precision, jurisdiction, limits of enforcement, and possible alternatives.

The activity, *Defend Your Case*, allows students not only to present their arguments for or against the law written in the previous section, but also to examine their reasoning and presentation.

East Africa Hypothetical is a case study that requires students to judge the actions of an African villager in a murder trial. Positive law, legal realism, and sociological law are discussed. A suggested lesson plan is provided.

The Constitution is the focus of the *Bill of Rights and Criminal Procedure* section wherein students are requested to identify the basic rights of individuals and define some preliminary legal terminology.

Upon completion of this chapter students will have acquired a fundamental knowledge and understanding of the law in order to interpret particular case studies presented in subsequent chapters.

00021

VALUE SURVEY

Directive: To provide the students with an evaluation of critical facts relating to individual rights and freedoms.

Informat: Distribute the survey contained on the following page.

Motivat: After distributing the survey, have the results compiled on a class tally board so that they may be examined for a post analysis. Students should discuss their opinions on the various topics noted on the survey.

Reference: Refer to Audio-Visual section.

000222

WHAT DO YOU THINK?

The subject of Individual Rights has become of paramount concern among high school students. There is a growing request for legal education and case study analysis among school administrators and curriculum developers. Indicate your opinion on the following topics by placing P for pro, C for con, U for undecided.

_____ Individuals should be guaranteed rights against search and seizure without a warrant.

_____ Individuals should be stopped and frisked only under suspicion of a serious crime.

_____ The legal court system should be computerized to alleviate delay.

_____ The death penalty should be imposed for serious crimes.

_____ Individuals should be allowed to say anything they wish in what ever manner they prefer.

_____ School administrators should permit pregnant girls in school throughout their term.

_____ Individuals should be informed of more rights than those normally explained at an arrest.

_____ The juvenile system should be revised to include more rights.

_____ The press media should be prevented by some government imposition from printing unsubstantiated speculations.

_____ Consumers should be guarded against warranty or liability technicalities by law.

_____ Abortions should be prevented since they violate the pursuit of life and liberty.

_____ Laws should be made to eliminate interpretations.

00023

WHY DO WE HAVE LAWS?

Directive: To provide the student with an opportunity to construct a law relevant to his school situation.

To encourage the examination of existing laws for their form and development as described via discussions.

Informat: The world of law and legal terminology can be both interesting and at the same time extremely confusing. Laws are not definitive and, therefore, are subject to interpretation. This factor provides for flexibility, depending upon varied circumstances and social morals. Justice Oliver Wendell Holmes stated that "Precedents should be overruled when they become inconsistent with present conditions." Laws can be classified depending upon their origin or jurisdiction. *Common law* is bench-made law rather than strict fixed bodies of definite ruies such as modern civil codes. In Roscoe Pound's words, "It is a mode of judicial and juristic thinking, a mode of treating legal problems." Under it the judge is creator, interpretor, and modifier. *Statutory law* is concerned with society as a whole rather than private citizens. It is a law that originates with specifically designated, authoritative lawmaking bodies, presumably legislators or congresses, but it also may include executive and administrative decrees, treaties, ordinances, and forms of protocol. *Private law* governs the relationship between citizens such as contracts. *Public law* deals with definition, regulation, or enforcement of those rights where the state is viewed as the subject of the right. It is the portion of the law concerning the political situations between individual and state. Subscripts of public law are administrative law (agency activities), Constitutional law (interpretation of existing laws), and civil law (legal rights of private persons and/or organizations).

Motivat: Students are to be directed to isolate a number of local concerns preferably those involving their school. One topic which illustrates some controversy should be selected as the topic for forming a law. Students are to be instructed to write a law via discussions of various aspects of the topic selected. The instruction should ask questions that will indicate the following factors:

1. precision of language used
2. portions conflicting with existing laws
3. extent of jurisdiction
4. degree of ambiguity open to interpretation
5. limits and means of enforcement
6. implications and scope of language
7. alternate means of handling situation
8. consequences of enforcement or non-enforcement
9. acceptability by majority
10. historical references.

An example would be the topic of a school newspaper publication written into a law stating "Students shall be permitted to publish any material in a school newspaper and distribute it to any individual." Questions would have to define: (1) what material can be published, (2) who would have right of censorship, (3) what criteria should be established to govern policy, (4) who shall review the final copy, (5) has a newspaper been previously published and banned — why, (6) how will distribution be limited, (7) what punishment will be levied by misuse, (8)

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what limitations will be placed on staff, reviewing body, distributors, etc. Students can be given roles of various key persons and reflect their positions. A student should be designated as a recorder of how the law evolves so that the notes can later be examined.

Reference: Some legal terminology can be introduced and explained. Refer to the glossary provided, page 111. A lawyer or judge can be a guest speaker to discuss law formations and decisions. (Refer to Resource Material appended.)

00025

DEFEND YOUR CASE

Directive: To provide an awareness into legal defense and prosecution.

Informat: The purpose of a defense or prosecution is to win the case. In most cases this involves a thorough knowledge of the law in question and the ability to detect flaws.

Motivat: The main portion of the information provided in this section is unwritten and gained from experience. This activity is an actual preparation for understanding case studies and a reference point in the mock trial of *Tinker* v. *Des Moines* in Chapter Three. Students should be divided into groups of three: one defender, one prosecutor, and one observer. The "law" composed in the previous section can be used in this gaming – or any local law. The defender and prosecutor are to present their opposing views while the observer (or judge) records the movement of the arguments. After allowing 20 minutes for an uninterrupted rebuttal portion, the observer should be given 10 minutes to discuss his observations. The class should then be reunited with defense, prosecution, and observers grouped together. Basically, these points should be noted:

1. Which role was more difficult and why?
2. What was the major order of most presentations or how did each side present their views?
3. Which side won in the observers' views?
4. What conclusion can be drawn on these roles?

As noted in the Introduction, page xxvii, interning is an important portion of this unit. Students now are to visit other classes, the faculty, and principal and present the law and then their arguments. The host class should decide the "winner," basing their judgment upon the above points. ADVANCE NOTIFICATION TO OTHER CLASSES SHOULD BE GIVEN TO AVOID CONFUSION.

Reference: Because of the nature of this activity, detailed explanations would not be profitable. A substitute gaming would be to rewrite the introduction to the Constitution. Or, perhaps the above format could be used to resolve why "all men are created equal" and women's rights can coexist.

00026

EAST AFRICA HYPOTHETICAL

Directive: To provide students with an understanding into the different approaches to law.

Informat: This section is an introduction into the case study approach and legal precedence. There are several outlooks on a law such as positive law (applies law to case without interpretation), legal realism (accommodates or appropriates law to circumstances), and sociological law (applys or blends custom with law).

Motivat: The actual case study should be either read or distributed as it appears on the following pages. The subsequent three legal opinions demonstrating the approaches to law should be noted after the activity.

Students are to be divided into groups of judging bodies in order to examine the case. Ask them to devise a rationale for and/or against the man's conviction. After an appropriate lapse of time list the results and via discussion separate the approaches to law. If not all of them appear, ask questions to stimulate their formulation. Students could be asked to compile a case study containing the case and the majority group or class opinion with the dissent, as a familiarization with up-coming case studies. This first case study is included within a suggested lesson plan designed by Norman Gross, Director, Special Committee on Youth Education for Citizenship, American Bar Association, to demonstrate its effective use in legal education.

Reference: Refer to Resource B for additional information. If possible, a field trip to a court is suggested in order to interview a judge with regard to legal bias and rationale. ADVANCE NOTIFICATION TO SCHOOL ADMINISTRATION AND COURTS IS REQUIRED FOR THIS ACTIVITY.

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FOUNDATIONS OF LAW[2]

(to extend for several class periods)

This lesson focuses on the nature of law, highlighting several of the different approaches to law, and also illustrates the use of the case study method in legal education.

1. Teacher should ask the class: *What is law?* Write down on an overhead projector or the blackboard the responses given by students, and ask them to explain or clarify what they mean. (No real judgment on the right or wrong of their input is necessary at this time.)

2. After a period of general, open discussion, the teacher takes the lead by asking questions which will bring the class eventually to some consensus on a definition of law. For instance, a discussion might consider:

   - Is there an element of morality in law?
   - Is there a relationship between morality and self-interest? (How would you handle a situation in which a person comes onto your property to take something which he claims as rightfully his?)
   - How do people use law for their own ends, even though the law itself is an attempt to establish morality and justice?
   - Is law the will of the strongest? (not necessarily)
   - Would anyone argue that a society (or people living together) could exist without law (whatever form it takes)?
   - Is law rules and regulations generally accepted by society? (Some laws will not hold up to this definition.)

   Eventually, class should come to see that: *law is some framework that positively or negatively stabilizes life among a group of people.*

3. Hand out the hypothetical case (page 17) and have the students read it over on their own.

4. Have students write down in class (or for homework):

   a. a *list* of the facts in the case (as known from handout)
   b. the *issues* involved
   c. what *decision* they would reach (assume that students are members of an outside tribunal)
   d. the *opinion*, i.e., why the decision turned out to be what it was.

   Students should assume only the facts as given. Note that some of the facts may be hearsay and should be stated as such, e.g., "The young man said that ..."

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[2]Norman Gross: adaptation from tape recording of Individual Rights Workshop, IPLE, April 2, 1974.

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5. After sufficient time, the teacher should go over the points listed above. First, *what are the facts? What happened?* List them on the board or overhead projector as students volunteer their responses, taking time to discuss each one.

   - He killed woman, after creeping into her hut.
   - Two children died.
   - He alleges self-defense.
   - He was convicted at trial level and sentenced to death.
   - He turned himself in.
   - The accused had non-Western background.
   - etc.

6. Have students try to separate the important facts from the unimportant.

7. Ask them what facts can be *inferred* as reasonable assumptions. Students should support their responses (e.g., he thought woman would kill him).

   - Can it be inferred that there is a tribal belief in witchcraft? (Not usually. It is not given and cannot really be assumed.)
   - Would it make a difference if only he believes in witchcraft as opposed to the whole tribe?

8. Use the witchcraft question to lead into a discussion of *what facts are not given that need to be known.*

   Examples:
   - What did children die of?
   - Did other children die mysteriously during this period?
   - Does the tribe believe in witchcraft?
   - What are the general customs and ways of this tribe?
   - Is there a difference between witchcraft used as a power to heal rather than to kill?
   - Was the woman a witch? If so, what kind?
   - Does the tribe have laws against evil witchcraft?
   - If so, is the young man the proper person to enforce these laws or should he go to the headman first?

9. Turn discussion to *issues* involved. The most critical part of any case study is the issues. The decision in a case is based on what the issue(s) is (are) perceived to be. In asking the students to give the issues, have them define and frame them into "Whether or not..." questions.

   Examples:
   - Whether or not the murder by the man was self-defense?
   - Whether or not a Western court should apply Western standards?
   - Whether or not witchcraft was involved?

   Ask class: Assume that the man honestly believes in witchcraft: how many would support his claim of self-defense? What is the Western definition of self-defense? (A reasonable person would believe that to do otherwise would lead to imminent physical harm to himself, resulting in death.)

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- Is this ridiculous, i.e., if a person is in danger of death, can he be expected to act "reasonably?"

10. Hand out the three opinions of the High Court judges (page 19) and have the students read them over.

11. Ask the students which judge they agree with and why. (Take an informal poll through a show of hands: how many agree with the first judge? the second? the third? Any dissenters or fourth alternatives?)

    Note: It can be inferred from the decisions that witchcraft is accepted by the tribe. What did the judges say about the young man's beliefs in witchcraft? (They said the beliefs were sincerely held.)

12. Each judge represents a different approach to law.

    a. The first judge is practicing *Positive Law* (applying the law to the particular case – in this case, what a reasonable Englishman would do).

       Note: In the poll of student reaction, usually very few side with the first judge. Ask the students why more did not agree with the first judge, since he was only "doing his job" as we traditionally view the role of a judge, i.e., to apply and interpret the law.

    b. The second judge practices *Sociological Law* (applying or blending custom with law). Many issues in the law are a balance of countervailing forces. This judge says that British law has certain criteria for what constitutes self-defense, but this has to be modified under the circumstances. He even makes political judgments, referring to "neo-colonialism."

       Note: Many students will probably side with the second judge. Did the students apply the principle of "what a reasonable man would do" but change the location from Piccadilly to an East African tribe?

    c. The third judge is following what is called *Legal Realism* (accommodating the law to particular circumstances – defining the law according to what he thinks it should be in the situation). Ask what the third judge is trying to do in his decision.
       the third judge is trying to do in his decision.

       - achieve a compromise?
       - set a precedent?

13. Ask the students whether a fourth approach should be included, *Natural Law* (a higher law exceeding the written law being applied, such as that recognized in upholding claims of conscientious objectors to military service).

    The judges could have said that none of the approaches was satisfactory, thereby taking the case out of the realm of the legal system altogether.

14. Point out that there are many different approaches to the question and that arguments can be made for each decision. In any case under study, students should investigate what kind of an approach to law is used by the judge. The particular East Africa case is good for several reasons: it is complicated

00030

(crime, witchcraft, etc.); it considers the question of what is a "reasonable" defense; it deals with the issue of a clash of cultures (comparing and contrasting laws from different countries and cultures can be very enlightening).

15. In conclusion, point out that there are two results of any case:

    a. guilt or innocence of the individual involved is determined;
    b. a precedent is set for future cases of a similar nature.

    Every case makes law for society. There is a need to look at a case's effect on the law. Ask: What would be the effects of various decisions possible in the East Africa case?

    Due process requires that laws be precise and clear, and that guidelines be set regarding enforcement. Otherwise, law would have no meaning. People would be unable to determine what they can or cannot do.

16. Suggestions for further activities:

    a. Have students write a law, including the components of *rule* and *enforcement apparatus*. They will find it extremely difficult to frame a law (e.g., a school dress code) that is both general in nature and yet not open to a wide variety of interpretations.

    b. Have students try to construct a society (e.g., students have been shipwrecked on an island). See what happens. Are they at a loss? Do rules and guidelines emerge? This is a good exercise in teaching the foundations of law.

00031

A young man in a remote village, uneducated in the Western sense, is charged with murdering a relative, an old woman. He admits killing her but says he did so in self defense: she was a witch, sworn to kill him by incantation.

The story told by the young man is that one of his children came down with an unknown illness, weakened mysteriously, and died. By tribal custom the old woman, his relative, should have prepared the funeral rites, but she did not do so. When he asked her why, she said she had cast a spell on the child and would kill all his family.

Then another child sickened and died. The man confronted the old woman and demanded she stop. She laughed, looked hard at him, and said she would see that he died before sundown that day. He went away, found an axe, crept into the old woman's hut, and killed her. Then he turned himself in to the head man.

The young man was convicted and sentenced to death.

00032

Removed to conform with copyright laws.

Article by Anthony Lewis, "Law and Policy in East Africa," from *New York Times*, January 3, 1970.

BILL OF RIGHTS AND CRIMINAL PROCEDURE

Directive: To provide the students with an opportunity to analyze laws.

To provide a knowledge of the criminal procedure in a basic sense, for background into upcoming case studies.

Informat: The constitutional laws of criminal procedure are contained in two sections of the original Constitution and five of the amendments. Each rule is restated in its basic form, with its source in parentheses:

1. The federal government may not suspend the writ of habeas corpus for persons whose freedom is limited by federal power. There is one exception. The writ may be suspended if (1) there is either rebellion or invasion, (2) during such rebellion or invasion the public safety requires its suspension. (Art. I Sec 9)

2. Except for impeachment, all federal crimes shall be tried by a jury. (Art. III Sec. 1)

3. All federal trials will be held in the state where the crime was committed. (Art. III Sec. 1)

4. People have a right to not have their persons, houses, papers, and effects unreasonably searched or seized by the federal government. (4th Am.)

5. Search warrants and arrest warrants can be issued to federal officers only on probable cause. The officer seeking the warrant must swear or affirm that the information he is giving in order to receive the warrant is true. (4th Am.)

6. A search warrant or arrest warrant issued to a federal officer must specifically describe the place to be searched or the persons and things to be seized. (4th Am.)

7. In order to charge a person with a serious federal crime, there must be a Grand Jury indictment. However, this rule does not apply to crimes committed in the land or naval forces or in the militia when the alleged crime is in actual service and it is a time of war or of public danger. (5th Am.)

8. No person charged with committing a federal crime may be placed in jeopardy more than once for the same defense. (5th Am.)

9. No person may be forced by the federal government to be a witness against himself or incriminate himself. (5th Am.)

10. The federal government may not deprive any person of his life, liberty, or property, except with due process of the law. (5th Am.)

11. In criminal prosecutions in federal courts, the defendant has a right to a speedy trial. (6th Am.)

12. A person charged with a federal crime has the right to a public trial. (6th Am.)

13. A person charged with a federal crime has the right to an impartial jury. (6th Am.)

14. Federal trials must take place in the state and district where the crime occurred. (6th Am.)

15. A person charged with a federal crime is entitled to be informed of the nature and cause of the charges against him and to be confronted with the witnesses against him. (6th Am.)

16. A person charged with a federal crime has the right to compel witnesses in his favor to testify at his trial. (6th Am.)

17. A person charged with a federal crime has the right to have the assistance of counsel for his defense. (6th Am.)

18. The federal government may not impose excessive bail. (8th Am.)

19. The federal government may not impose an excessive fine. (8th Am.)

20. The federal government may not inflict cruel or unusual punishment. (8th Am.)

21. No state may deprive any person of his life, liberty, or property, except by due process of law. (14th Am.)

22. No state may deny anyone in its jurisdiction the equal protection of the laws. (14th Am.)

Note that under the Fourteenth Amendment as long as due process of law is maintained, someone may be deprived of his rights. The criminal process in operation can be somewhat reduced for examination. In a response to a citizen's complaint, a suspect may be arrested on a warrant or sent a summons to appear in court at some future time. The complaint can also come from the policeman who observes the crime. Often the arrest takes place at the scene of the crime and the complaint will follow. If arrested, the suspect may be released on bail at any time. In addition, the state may be required to hold a preliminary hearing to show probable cause for believing that the suspect has committed a crime. If probable cause is demonstrated – either a grand jury indictment or a prosecutor's information may be filed. The suspect will appear at court for a formal arraignment at which time he will be asked to plead. If he pleads guilty, he will be tried and sentenced in the event he is found guilty. The defendant may appeal a conviction on a plea of not guilty. Sentencing may include confinement or probation or a combination of both. Parole is supervised freedom ordered by a parole board prior to his time of release.

The theory behind the bail system is that a person charged with a crime may put up a certain amount of money, to assure his appearance at trial. This sum will be forfeited if he does not appear. The amount of bail is supposed to be just enough to assure that the suspect will not "skip." A suspect's prior record, the seriousness of the crime, his personal wealth, and his roots in the community are all considered. The bail system is intended to mirror the presumption of innocence – since all suspects are presumed innocent until proved guilty, they should not have to spend the time prior to trial in jail. This is the theory. The practice is often opposite. If a judge determines that a suspect should not be released prior to trial, he will set bail at a prohibitive amount. If he determines that pretrial release will be safe, bail will likely be nominal.

In 1967, the President's Commission on Law Enforcement and Administration of Justice reported:

Although bail is recognized in the law solely as a method of insuring the defendant's appearance at trial, judges often use it as a way of keeping in jail persons they fear will commit crimes if released before trial. In addition to its being of dubious legality, this procedure is ineffective in many instances. Professional criminals or members of organized criminal syndicates have little difficulty in posting bail, although, since crime is their way of life, they are clearly dangerous.

If a satisfactory solution should be found to the problem of the relatively small percentage of defendants who present a significant risk of flight or criminal conduct before trial, the Commission would be prepared to recommend that money bail be totally discarded. Finding that solution is not easy . . . .

A partial solution for the problem would be to provide an accelerated trial process for presumably high-risk defendants . . . .

In any case, money bail should be imposed only when reasonable alternatives are not available. This presupposes an information-gathering technique that can promptly provide a magistrate with an array of facts about a defendant's history, circumstances, problems, and way of life.

Motivat: Students should be asked to name as many rights as they can within the Constitution and Bill of Rights exclusively. After a listing has been compiled, students should examine the items in relation to Appendix A. The students' lists should then be expanded to incorporate the twenty-two rules previously listed.

A discussion should be initiated whereby various newspaper articles or other media be examined to pinpoint the entire criminal process.

1. What is the writ of habeas corpus?
2. What is a federal crime?
3. How is "unreasonable" defined in their own words? What constitutes a search? a seizure?
4. What is jeopardy? How did this originate?
5. How is a "speedy trial" defined?
6. Why are there public trials?
7. What is excessive bail? Who determines this?
8. What is cruel and unusual punishment?
9. What is due process under law?
10. Are there any rights that should be added or deleted? Why?
11. Why are individuals not informed of all of these rights? Are they applicable to everyone? If not, why aren't they? (juveniles, insane, criminals)
12. How are impartial juries selected? Why is this sometimes impossible?

A survey could be produced and distributed to other classes as a test of their legal rights. Discuss the results. If there is a lack of knowledge, to what can this be attributed in today's society?

In reviewing the criminal process in light of the secondary discussion, variances in its general procedure should be investigated and explained. Students can research current newspaper articles on local, state, and federal crimes.

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Reference: Additional material should be obtained on the due process phase of this section. Reference material should include:

Benton v. *Maryland* 396 U.S. 784 (1969)
Adamson v. *California* 332 U.S. 46 (1947)
Rochin v. *California* 342 U.S. 165 (1952)
Cohen v. *Hurley* 366 U.S. 117 (1961)
Malloy v. *Hogan* 378 U.S. 1 (1964)
Pointer v. *Texas* 380 U.S. 400 (1965)
Duncan v. *Louisiana* 391 U.S. 145 (1968)
Williams v. *Florida* 399 U.S. 78 (1970)

Resource A and C may also be consulted in addition to the glossary.

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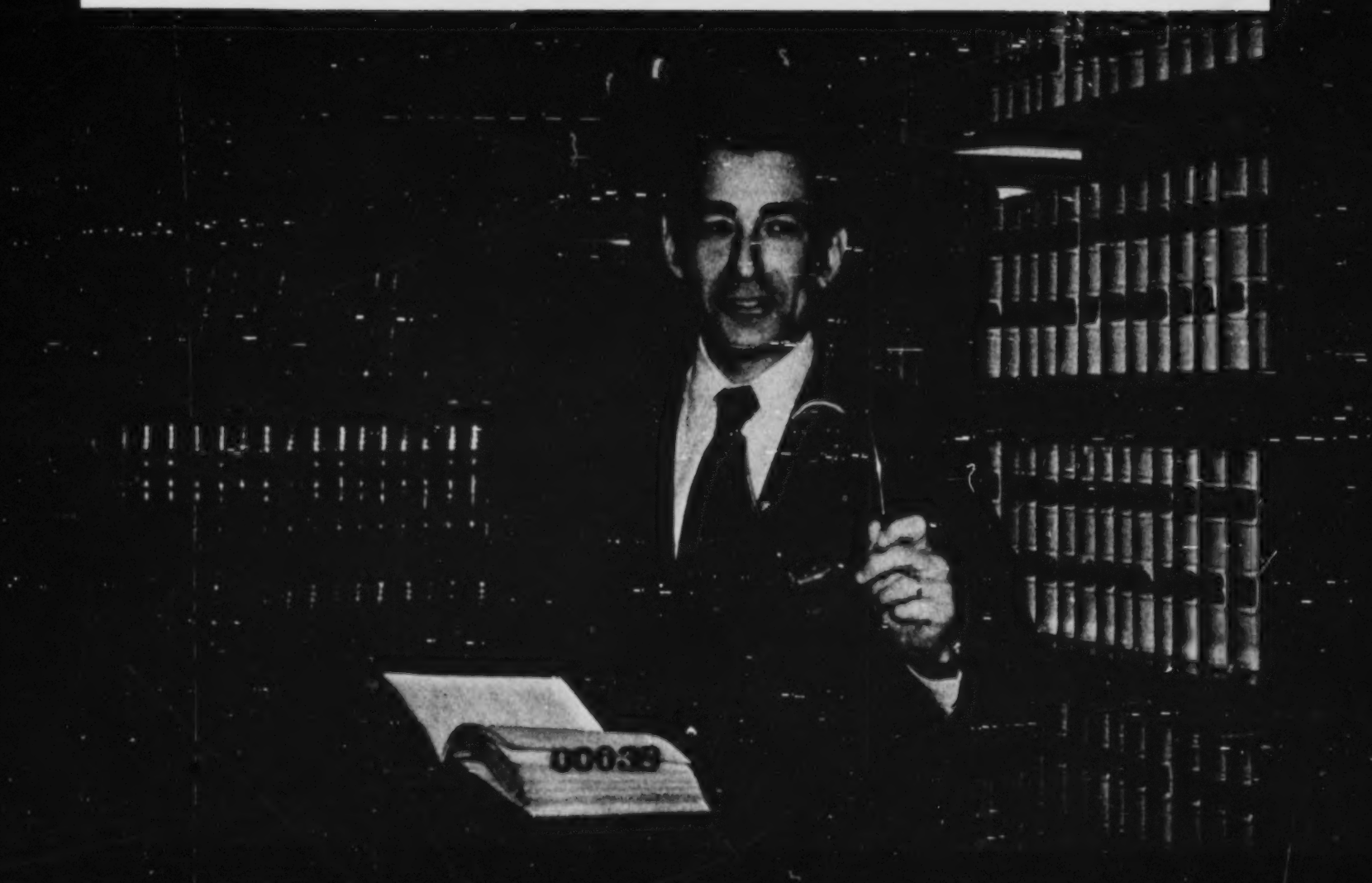
DUE PROCESS



CHAPTER II

DUE PROCESS AND JUDICIAL REVIEW

INTRODUCTION

The purpose of this chapter is to provide an introduction to due process and judicial review. The historical case of *Marbury* v. *Madison* and other case studies presented herein are illustrative of the topics. Directed questioning with these case studies, plus a hypothetical case, will aid in achieving deeper understanding.

Directive: To provide students with an insight into the nature and scope of judicial precedence.

To provide students with an opportunity to investigate the ramifications of the 14th amendment and its applicability to the U.S. Bill of Rights. To introduce the concept of due process.

Informat: The familiar case of *Marbury* v. *Madison* involves the installment of William Marbury to justice-of-the-peace in the District of Columbia. The question centers on the right of the courts to decide if Marbury's writ of mandamus is valid. The case study, inclusive of Justice Marshall's annotated decision, is contained in the manual as it appears on 29-37. The question of aggravated violations of due process is presented in two condensations of *Rochin* v. *California* and *irvine* v. *California* as they appear on page 37. In Slaughterhouse cases 83 U.S. (16 Wall) 36 (1873), the Supreme Court analyzed the precise meaning of the 14th amendment and concluded that it recognized two distinct citizenships, that of the state and nation. Therefore the power of states to determine and consequently limit the rights of their own citizens remained unaffected by the Amendment (the case of *Strauder* v. *West Virginia* pp. 38-39).

Motivat: The following hypothetical case could be presented as a prelude to the case of *Marbury* v. *Madison.*

> *The year is 2009, thirty-three years after the first installation of the LEGCOM 3225 focal computer system. The unit was designed by a special investigative and developmental branch of the judiciary Department on the request of President Harrison at a cost of $3.5 billion dollars. The analog system is designed to eliminate the time involved with court cases. It was programmed with the United States Constitution and the Declaration of Independence, along with any applicable state or international laws. For example, if a person was searched in a parking lot by a police office for drugs, the defendant would enter a card with his/her version of the occurrence and complaint with a plea of guilty or not guilty. The officer or witnesses would enter similar cards in their terminal. The computer analyzes the data and refers to Amendment IV card, No. 3947c, and announces that the shopper had the right to be searched.*

Students should be directed through questioning to the fact that LEGCOM does account for any cases decided in the past. The case study of *Marbury* v. *Madison* is introduced to illustrate what the early Supreme Court, utilized to substantiate its position. The following questions could be used:

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Is the doctrine of "judicial review," which gives the court the power to declare an act of a coordinate branch of the government unconstitutional, required because a contrary rule would "subvert the very foundation of all written constitutions?"

Does the "judges' oath" provision (Art. VI, cl. 3) furnish the necessary textual support for the doctrine of judicial review?

What of Art. III, 2, cl. 1, extending "the judicial Power" "to all *cases. . .arising under this Constitution?"*

Students should note in the *Slaughterhouse* case the scope of the 14th Amendment as it applies to any privilege of immunity conferred by the U.S. Constitution and that a narrower construction declares it as a repetitive note of previously stated principles. What appear to be reasons for such a narrow interpretation – relief against monopoly or equal protection under the laws? It might be instructive at this point to compare carefully statements from the documents quoted below.

No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

Magna Carta (1215)

No person shall be . . . deprived of life, liberty, or property, without due process of law.

Fifth Amendment to the Constitution (1791)

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Fourteenth Amendment to the Constitution (1868)

The following questions should be discussed in conjunction with the *Strauder* case (pages 37-39).

1. In view of the intent of the equal protection clause, are there any additional classes for whom it should be "construed liberally?"
2. Why would a law discriminating against "German Texans" be consistent with the purpose of the amendment?
3. What "politically potent minorities" could be singled out for special legislative advantages or disadvantages?
4. Should legislation discriminating on the basis of congenital and unalterable traits for which the person is not responsible justify the creation of a "suspect" classification?
5. Are women considered "politically impotent minorities" (consider alien, illegitimate, criminally insane)?

Students should investigate in the *Rochin* and *Irvine* cases (page 37) the proposition that although evidence obtained in violation of the protection against unreasonable search and seizure violates the minimal, fundamental standards of due process, the use of such evidence does not constitute a unique due process violation.

Reference: The following cases should be reviewed:

Madden v. *Kentucky* 309 U.S. 83
Llague v. *C10* 307 U.S. 496
Edwards v. *California* 314 U.S. 160
Turner v. *Fouche* 396 U.S. 346

Opinions by various individuals are provided herein.

JUSTICE GIBSON, dissenting in **Eakin** *v.* **Raub,** *12 S. & R. 330 (Pa. 1825):** *"The oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every office of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty: otherwise, it were difficult to determine, what operation it is to have in the case of a recorder of deeds, for instance, who, in execution of his office, has nothing to do with the Constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still, it must be understood in reference to supporting the Constitution, only as far as that may be involved in his official duty; and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath. . .*

"But do not the judges do a positive act in violation of the Constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the Constitution. The fallacy of the question is, in supposing that the judiciary adopts the acts of the legislature as its own; whereas, the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the constitution which may be the consequence of the enactment; the fault is imputable to the legislature, and on it the responsibility exclusively rests."

THOMAS JEFFERSON, writing in 1804, in **The Writings of Thomas Jefferson** *310 (1897): "The Judges, believing the [Sedition law] constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. The instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the Judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislative and Executive also in their spheres, would make the judiciary a despotic branch."*

*This opinion is generally regarded as the most effective answer of the era to Marshall's reasoning supporting judicial review.

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ANDREW JACKSON, veto message in 1832 on act to recharter Bank of United States (the constitutionality of which had earlier been upheld by the Court), 2 Richardson, **Messages and Papers of the Presidents** *576, 581-82 (1900): "It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."*

ABRAHAM LINCOLN, inaugural address in 1861, 2 Richardson supra, at 5, 9-10: "I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such a decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes."

HENRY HART and HERBERT WECHSLER, **The Federal Courts and the Federal System** *93 (1953): "Both Congress and the President can obviously contribute to the sound interpretation of the Constitution. But are they, or can they be, so organized and manned as to be able, without aid from the courts, to build up a body of coherent and intelligible constitutional principle, and to carry public conviction that these principles are being observed? In respect of experience and temperament of personnel? Of procedure for decision? Of means of recording grounds of decision? Of opportunity for close examination of particular questions?"*

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CHARLES BLACK, **The People and the Court** *176 (1960): "I cannot believe anyone seriously thinks that, in fact rather than in fiction, the Congressman understands, better than the Justice, the history of our country, the theory and structure of its political, economic, and social institutions, or most of the other things that bear on prudent constitutional decision."*

LEARNED HAND, **The Bill of Rights** *11-15 (1958): "[L]et us try to imagine what would have been the result if the power [of judicial review] did not exist. There were two alternatives, each prohibitive, I submit. One was that the decision of the first 'Department' before which an issue arose should be conclusive whenever it arose later. That doctrine, coupled with its conceded power over the purse, would have made Congress substantially omnipotent, for by far the greater number of issues that could arise would depend upon its prior action. . . .*

As Hamilton intimated, every legislator is under constant pressure from groups of constituents whom it does not satisfy to say, 'Although I think what you want is right and that you ought to have it, I cannot bring myself to believe that it is within my constitutional powers.' Such scruples are not convincing to those whose interests are at stake; and the voters at large will not usually care enough about preserving 'the balance of the Constitution' to offset the votes of those whose interests will be disappointed. . . . Moreover, the second alternative would have been even worse, for under it each 'Department' would have been free to decide constitutional issues as it thought right, regardless of any earlier decision of the others. Thus it would have been the President's privilege, and indeed his duty to execute only those statutes that seemed to him to be constitutional, regardless even of a decision of the Supreme Court. The court would have entered such judgments as seemed to them consonant with the Constitution; but neither the President, nor Congress, would have been bound to enforce them if he or it disagreed, and without their help the judgments would have been waste paper.

For centuries it has been an accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand; and this applies with especial force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen occasions, must be cast in general language, unless they are constantly amended. If so, it was altogether in keeping with established practice for the Supreme Court to assume an authority to keep the states, Congress, and the President within their prescribed powers. Otherwise the government could not proceed as planned; and indeed would almost certainly have foundered, as in fact it almost did over that very issue.

However, since this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution."

May a Congressman vote against a bill because he believes it to be unconstitutional even though the Court has held to the contrary? May the President veto such a bill on this ground? If the Court has upheld the constitutionality of a federal criminal statute, may a subsequent President release and grand pardons to all persons convicted under it (see Art. II, § 2, cl. 1)? If the President altogether refuses to "receive Ambassadors and other public Ministers" (see Art. II, § 3), may the Court order him to do so?

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J. SKELLY WRIGHT, **The Role of The Supreme Court in a Democratic Society,** *54 Corn. L. Rev. 1, 11 (1968); "This argument for judicial restraint not only overplays the Court's deviancy but also overstresses its immunity from democratic processes. To begin with, the Justices are appointed by the President, the one elected official whose constituency is the nation as a whole. On the average a new appointment is made every twenty-two months. And, as Justice Frankfurter reminds us, 'Judges are men, not disembodied spirits' who are blind to the political reality among them. Moreover, if the Justices are not themselves sufficiently attuned to the times, Congress can bring reality home to them through its power over the Court's appellate jurisdiction. Indeed, if the Court is too far out of touch with the people, the Congress and the executive can annul its directives simply by refusing to execute them, or the people can do so by constitutional amendment. In sum, although the Court is not politically responsible, it is likely to be politically responsive."*

LEONARD LEVY, **Judicial Review, History, and Democracy: An Introduction,** *in Judicial Review and the Supreme Court 1, 12 (1967): "Judicial review would never have flourished had the people been opposed to it. They have opposed only its exercise in particular cases, but not the power itself. They have the sovereign power to abolish it outright or hamstring it by constitutional amendment. The President and Congress could bring the Court to heel even by ordinary legislation. The Court's membership, size, funds, staff, rules of procedure, and enforcement agencies are subject to the control of the 'political' branches. Judicial review, in fact, exists by the tacit consent of the governed."*

MARBURY v. *MADISON*

Thomas Jefferson, an Anti-Federalist (or Republican), who defeated John Adams, a Federalist, in the presidential election of 1800, was to take office on March 4, 1801. On January 20, 1801, Adams, the defeated incumbent nominated John Marshall, Adams' Secretary of State, as the fourth Chief Justice of the United States. Marshall assumed the office on February 4 but continued to serve as Secretary of State until the end of the Adams administration. During February, the Federalist Congress (1) passed the Circuit Court Act, which, among other matters, doubled the number of federal judges and (2) authorized the appointment of 42 justices-of-the-peace in the District of Columbia. Senate confirmation of Adams' "midnight" appointees, virtually all Federalists, was completed on March 3. Their commissions were signed by Adams and sealed by Acting Secretary of State Marshall, but due to time pressures, several for the justices-of-the-peace, including that of William Marbury, remained undelivered when Jefferson assumed the presidency the next day. Jefferson ordered his new Secretary of State, James Madison, to withhold delivery.

Late in 1801, Marbury sought a writ of mandamus in the Supreme Court to compel Madison to deliver the commission. The Court ordered Madison "to show cause why a mandamus should not issue" and the case was set for argument in the 1802 Term.

While the case was pending, the new Republican Congress – incensed at Adams' efforts to entrench a Federalist judiciary and at the "Federalist" Court's order against a Republican cabinet officer – moved to repeal the Circuit Court Act. Federalist congressmen argued that repeal would be unconstitutional as violative of Art. III's assurance of judicial tenure "during good behavior" and of the Constitution's plan for separation of powers assuring the independence of the Judiciary. It "was in this debate that for the first time since the initiation of the new Government under the Constitution there occurred a serious challenge of the power of the Judiciary to pass upon the constitutionality of Acts of Congress. Hitherto, [it had been the Republicans] who had sustained this power as a desirable curb on Congressional aggression and encroachment on the rights of the States, and they had been loud in their complaints at the failure of the Court to hold the Alien and Sedition laws unconstitutional. Now, however, in 1802, in order to counteract the Federalist argument that the Repeal Bill was unconstitutional and would be so held by the Court, [Republicans] advanced the proposition that the Court did not possess the power."

The Repeal Law passed early in 1802. In order to forestall its constitutional challenge in the Supreme Court until the political power of the new administration had been strengthened, Congress also eliminated the 1802 Supreme Court Term. Thus, the Court did not meet between December, 1801 and February, 1803.

[O]n the 24th February, the following opinion of the court was delivered by Mr. Chief Justice MARSHALL: . . .

> *No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it require a complete exposition of the principles on which the opinion to be given by the court is founded. . . .*
>
> *1st. Has the applicant a right to the commission he demands? . . .*

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right. . . .

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . .

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appelation, if the laws furnish no remedy for the violation of a vested legal right. . . .

Where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. . . .

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies? This depends on,

1st. The nature of the writ applied for; and,

2dly. The power of this court.

1st. The nature of the writ. . . .

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation.

Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, . . . what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law? . . .

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of confering the authority, and assigning the duties which its words purport to confer and assign. . . .

In the distribution of [the judicial power of the United States] it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction, made in the Constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it. . . .

The authority, therefore, given to the Supreme Court, by the Act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an Act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law: if the latter be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the Constitution is to be considered in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an Act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such Act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

ROCHIN V. CALIFORNIA

Having "some information that [Rochin] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found him sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed the deputies spied two capsules. When asked "Whose stuff is this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

Rochin was convicted [of possessing morphine] and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules.

Mr. Justice FRANKFURTER delivered the opinion of the court.

...The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interest of society pushing in opposite directions.

Due process of law thus conceived is not to be derided as resort to a revival of "natural law." To believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim. To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation. ...

Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

IRVINE V. CALIFORNIA

Police made illegal entries into Irvine's home to install initially hidden recording devices and in subsequent entries to move such mechanisms to the bedroom in order to ascertain the conversations of the occupants. Justice Jackson in announcing the judgment of the Court proclaimed that "few police measures have come to our attention that most flagrantly, deliberately and persistently violated the fundamental principles declared by the Fourth Amendment. . ."

STRAUDER V. WEST VIRGINIA

Mr. Justice STRONG delivered the opinion of the court.

[The Supreme Court of Appeals of West Virginia affirmed the conviction of a Negro for murder despite his contention that "by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State."]

It is to be observed that [the question] is not whether a colored man . . . has a right to a grand or a petit jury composed in whole or in part of persons of his own race of color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law solely because of their race or color, so that by no possibility can any colored man sit upon the jury. . .

[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the Slaughter-House Cases, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject

race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. . . . It was in view of these considerations the Fourteenth Amendment was framed and adopted. . . .

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall . . . deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries . . . is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.

. . . It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. . . . The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. . . . It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this.

FREEDOM OF EXPRESSION

CHAPTER III

FREEDOM OF EXPRESSION

INTRODUCTION

Some of the fundamental issues concerning freedom of expression which have come before the Supreme Court may never be resolved. New ones will no doubt arise and the old ones might return in other forms. However, there is a deep commitment by the Supreme Court to define the limitations of freedom of expression that respond to the needs of the changing society.

This chapter introduces the historical aspects of expression, seditious speech, public and private forums, and symbolic speech. Students will first investigate, through a classroom activity, their own concepts of what the Constitution allows in the First Amendment.

They will also be expected to define or explain the First Amendment's treatment of obscenity, or reference to sex and pornography as expression, as evidenced in *Roth v. United States*, a case study activity. Further discussion will be held in regard to libel, *New York Times v. Sullivan*, and dissent in a democracy.

In Mock Trial: *Tinker v. Des Moines*, a simulation activity, students will become familiar with the freedom of expression by assuming roles of individuals associated with the freedom of expression.

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FREEDOM OF EXPRESSION: HISTORICAL ASPECT

Directive: To provide the student with the opportunity to formulate definitions dealing with the media of speech.

Informat: The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." Although there have been occasional suggestions that the due process clause of the Fourteenth Amendment applies a lesser restriction as against state and local governments [Justice Jackson, dissenting in *Beauharnais v. Illinois*, 343 U.S. 250 (1952); Justice Harlan, concurring in *Roth v. United States* 354 U.S. 476 (1957)], it is clear that the guarantees of the First Amendment have been fully incorporated into the Fourteenth Amendment, and are thus applicable to the states. *Gitlow v. New York*, 268 U.S. 652 (1925).

Major Goals of Freedom of Expression

Freedom of expression is the cornerstone of representative government. The theory that major governmental decisions are not imposed upon the people by their rulers but that governments – in the language of the Declaration of Independence – "derive their just powers from the consent of the governed," depends upon the opportunity of citizens to be informed. That freedom of expression is, in part, a necessary precondition to government by the people is emphasized by the First Amendment's expressed recognition of the right of the people to assemble and petition the government for a redress of grievances, and by recent decisions which have treated the right of groups and individuals to space on the ballot as a right with First Amendment implications. *Williams v. Rhodes*, 393 U.S. 23 (1968).

Freedom of expression of ideas is essential for the search for truth, the improvement of ideas, and individual growth and social change. The "market place of ideas" concept is applicable beyond the political process; it applies to all human inquiry. This theory may have been more a product of Nineteenth Century thought, and not widely held when the Bill of Rights was adopted. It was most cogently stated in John Stuart Mill's essay, *On Liberty* (1859). Mill argued that suppressed opinions would compel rethinking of established opinions and that this was of value even to an individual possessing a "true" belief.

Freedom of expression is an important personal right. The two theories above mentioned have stressed the rights of the listener or the potential audience as the basis for the speaker's freedom. But the First Amendment recognizes freedom of expression, along with freedom of religion, as part of a concept of the individual's right to free intellectual and emotional development. Justice Jackson emphasized this aspect of freedom of expression in his opinion for the Court in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943), which struck down a law punishing public school students for refusal to participate in compulsory salute of the American flag. Emphasizing "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," he concluded: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." 319 U.S. at 642.

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The First Amendment and Court Opinions: A Preliminary Word of Caution

Court opinions, of course, and particularly United States Supreme Court opinions, are an excellent vehicle for analysis of the basic issues of freedom of speech. They present the generalities about free expression in concrete factual situations, and have produced articulate and forceful opinions by thoughtful judges about the ramifications of our commitment to that freedom. But if one looks at freedom of expression solely from the point of view of judicial decisions, there are distortions which should be taken into account.

First, court cases – particularly United States Supreme Court cases – often focus on the most difficult, perplexing problems of the conflict between the values of freedom of expression and other community values. Those cases should not detract from the fact that, for the most part, Americans can say and write what, when and where they want, without punishment and without the necessity of receiving official approval in advance.

Second, a constitutional law is not necessarily a wise one, nor are Supreme Court decisions the only guide. Citizens should be concerned with evaluating the performance of legislative bodies in enacting laws, of government officials in enforcing them, and the sense of responsibility and self-restraint exercised by private individuals and agencies – including the media – who exercise them.

Seditious Speech

The control of speech critical of government presents the most central problem of freedom of speech and of the press. Every period of national stress, from colonial times to the present, has produced significant issues concerning the extent of freedom to criticize the government and, in some cases, to advocate its forceful overthrow.

Symbolic Expression

When is conduct free expression? *Cohen v. California,* 403 U.S. 15 (1971) is a recent dramatic example. But there are others, including cases occasioned by the draft, the Vietnam War, and political activism in the schools, which focus on the problem.

In 1966, David O'Brien burned his draft card on a courthouse step as a protest against the draft. He was convicted under a federal law which made it a crime to destroy or mutilate a draft card. The Supreme Court held that O'Brien's conviction did not violate the First Amendment. *United States v. O'Brien,* 391 U.S. 367 (1968). The rationale of Chief Justice Warren's opinion was that the government had legitimate reasons for requiring selective service registrants to carry draft cards, and had reason to prevent their destruction, other than an interest in preventing people from communicating protest by burning their cards.

But what of statutes that prohibit burning or mutilating the American flag? While it is true that burning a flag is conduct, isn't the governmental purpose there to prohibit the conduct because of what that conduct communicates? The constitutionality of flag-burning statutes was argued before the Court in *Street v. New York,* 394 U.S. 576 (1969). A majority of the Court avoided the issue, however, reversing Street's conviction because it rested, in part, upon

his having verbally cast contempt upon the flag – something he had a constitutional right to do (or, more accurately, to say). But three of the four dissenting Justices (Warren, Black, and Fortas) argued that burning a flag was "conduct" which could constitutionally be punished. (Refer to page 53 for the Ray Brown activity on perceptions of freedom of speech)

The Conflict Between Freedom of Expression and Other Governmental Interests

As one approaches problems of freedom of expression other than those concerned with the danger of speech spawning unlawful conduct, the Supreme Court's approach to the issues has been eclectic. While it is possible to make useful generalizations about discrete areas, it is not possible to generalize about a single overall approach to free speech doctrine.

Press Discussion and Criticism of the Judicial Process:

Prior to a trio of Supreme Court decisions in the 1940's, the power of courts to punish publications which were either critical of a court's handling of pending cases, or were otherwise concluded to be detrimental to the administration of justice, had been conceded. In those cases, however, the Court applied the clear and present danger test to the issue of contempt by publication. *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947). Significantly, in none of those cases was a clear and present danger to the administration of justice found. Because these cases were decided at a time of judicial enthusiasm for the Holmes-Brandeis phrase, they set doctrinal pattern and clear and present danger continues to be the verbal formula for disposition of such cases. *Wood v. Georgia*, 370 U.S. 375 (1962). They seem to suggest that contempt is a proper sanction for newspaper criticism of a judge's conduct in a pending case if the danger to the fair administration of justice is serious enough. The cases indicate, however, that a newsman cannot be punished for contempt in any case, simply because his criticism of a judge's conduct is seen by the judge as distorted or unfair.

A question to which the Supreme Court has not addressed itself is whether direct restraints can be placed on the press to preclude comment on a pending criminal trial which would interfere with the defendant's right to a fair trial. The court has set aside convictions because of prejudicial pretrial publicity.*

Irvin v. Dowd, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333, (1966). Judicial "gag orders" directed to the defendant, the police, prosecutors and defense attorneys in pending criminal cases themselves raised issues about freedom of the press and the public's right to know. In an opinion commenting on the denial of Supreme Court to review of a state court decision reversing a contempt conviction of a radio station, justice Frankfurter suggested, citing English practice, that the "contempt by publication" cases would not preclude punishment of the press itself for disclosures which prejudiced defendants' rights to a fair criminal trial. *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950). Most lower courts, however, have held that the principle of those cases precludes extending a "gag order" to the press.

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*See IPLE manual *Fair Trial v. Free Press* for full examination of this issue.

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In *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1948), the Supreme Court recognized for the first time that members of unpopular organizations had a right to refuse to make public disclosure of their affiliation in that organization. In holding that Alabama could not compel disclosure of NAACP's membership lists, the Court distinguished an old case which had permitted New York to compel disclosure of Ku Klux Klan activities [*Bryant v. Zimmerman*, 278 U.S. 63 (1928)] on the ground that the Klan had been shown to be engaged in unlawful activities.

Most recently the issue of compelled disclosure has been raised in the context of the newsman's privilege. Newsmen have invoked the First Amendment, in those jurisdictions without statutory newsmen's privileges, claiming a right not to disclose confidential sources. The argument has been that, without the credible promise of confidentiality, news sources would dry up, and that, without the ability to gather information, freedom of the press would be a hollow right. The contention that the First Amendment grants to newsmen a broad privilege to refuse to disclose their sources was rejected by the Supreme Court in a 5-4 decision, *Branzburg v. Hayes*, 408 U.S. 665 (1972). Among the majority's arguments for rejecting the privilege was that the suggested constitutional privilege should not be absolute. The reporter could be compelled to testify in cases where the state had a compelling need for the information. Thus, sources could not know whether their confidence would be kept. They emphasized, too, the difficulty of defining the limits and exceptions to the privilege. [It should be pointed out that Justice Powell, who joined the majority opinion (and thus was the crucial fifth vote) suggested in a separate concurrence that a newsman's privilege based on the First Amendment might be recognized in an individual case if the information sought bore a tenuous relationship to the subject of the investigation or if there was no legitimate governmental need for the information.] *

Debate in Congress over the scope of a proposed federal statutory newsman's privilege has emphasized the dilemma highlighted by the Court's *Branzburg* opinion. Would a flat, unqualified newsman's privilege deny the government access to vitally needed information? On the other hand, would a qualified privilege be so unpredictable that the newsman's source could not know in advance whether the privilege would be respected? Debate has centered, too, on the empirical issue of the extent to which newsmen's sources dry up if no privilege is granted or if the privilege is significantly qualified.

Prior Restraint

Traditional English common law reflected an abhorrence of prior restraints. The issue has not been settled whether freedom of speech and of the press is *limited* to a protection against prior restraint. But modern case law indicates that the special constitutional inhibition against prior restraint is viable. Traditionally, prior restraints involved a system of administrative licensing. One who wanted to publish a book needed prior approval from an administrative official. It is all too easy for the administrative official or censor to say no, and the one wishing to speak or publish then carries the burden of going forward to test the lawfulness of the censor's action. This can be contrasted to a criminal prosecution where a prosecutor must bear his burden of making a case in court before official action is taken. It is this evil of the prior restraint system – stopping speech or publication by arbitrary denials of permission and then placing the burden of proof and the burden of initiating court action on the speaker or publisher – to which the later cases refer. And it is this feature of the ancient system of prior restraints which furnishes a clue to identifying modern prior restraints.

*A moot court activity based on the *Branzburg* case and others is included in the IPLE manual *Fair Trial v. Free Press.*

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Thus, for example, while a state may initiate proceedings to enjoin distribution of an allegedly obscene book [*Kingsley Books v. Brown*, 354 U.S. 436 (1957)], the prosecution carries the burden of bringing court action and the burden of proof, just as it would in a criminal case. On the other hand, a system in which an official state body sent out lists of objectionable books with threats to prosecute those who sold them was held to be an unconstitutional prior restraint. The Court emphasized that the formalized list of banned books, coupled with threats of prosecution, had been so effective – since booksellers complied – that the necessity of instituting criminal proceedings with their procedural safeguards had been eliminated. *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). The Court has refused to strike down, in an across-the-board fashion, all motion picture licensing ordinances. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961). But, the Court insisted that no censor, after denying permission to show the film, to shoulder the affirmative burden of going to court to restrain its showing. *Freedman v. Maryland*, 380 U.S. 51 (1965).

Permits for the use of parks and streets for parades, demonstrations, and meetings present a special problem. Because there is the possibility of traffic congestion and the like, and because not all can use the same public facility at once, a system requiring approval in advance is permissible. *Cox v. New Hampshire*, 312 U.S. 569 (1941). The law requiring a permit must, however, be narrowly drawn. Parade permits, for example, must be granted or denied with references to such considerations as traffic congestion, and not because the permit-granting official agrees or disagrees with the parade's message. A law giving the permit-granting official unbridled discretion to grant or to deny permits, or one that directs him to take into account the substantive content of speeches, meetings and the like, is unconstitutional. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

Parade permit cases have presented important procedural issues when permits are arbitrarily denied. Can the paraders ignore the decision denying them permission, parade without their permit, and then raise the legality of the adverse decision in a criminal prosecution for parading without a permit? Or must they first have the official decision denying the permit set aside? It is clear that if the ordinance or law providing for permits is unconstitutional, as in *Shuttlesworth*, the paraders may raise their constitutional defense and are not required either to apply for the permit or, if they do apply, challenge its denial. What if the law requiring a permit is constitutional, but the official administering it in fact denies permission for an unconstitutional reason? Here, the state can require the paraders to first challenge and set aside the official's decision in court. *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

What, finally, of court injunctions issued against particular parades, rallies, and meetings? In a 5-4 opinion in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), the Court upheld a state court decision that a court injunction against a parade must be obeyed until it is set aside, despite constitutional objections to the court order. But, in the following year the Court held that the issuance of an *ex parte* injunction, without notice and hearing, against rallies and political speeches, is an unconstitutional prior restraint. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968).

Probably, the most celebrated case raising the prior restraint issue is the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971). At issue was the propriety of injunctions against the *New York Times* and the *Washington Post* which would have precluded

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them from publishing the contents of a classified study. While the Court's 6-3 decision summarily concluded that the government had not carried its "heavy burden of proof" for the enforcement of a prior restraint, only two of the Justices in the majority – Black and Douglas – clearly stated a position that such injunctive relief was unconstitutional in any and all circumstances. Justices Stewart and White emphasized that, in the particular case, the government had not proved its contention that disclosure would result in irreparable damage to national security.

Time, Place and Manner – Public and Private Forums

It goes without saying that the right to speak is subject to time, place, and manner regulation. A student cannot insist on the right to give an anti-war speech in the middle of a mathematics class, a speaker cannot insist on the use of loudspeakers in a quiet hospital zone, and so on. But, to what extent must a municipality make its streets, public parks, public meeting rooms and other public facilities available for speeches, meetings, rallies and demonstrations? It is clear enough that if a city permits some groups to use the parks for meetings and speeches, it cannot arbitrarily deny them to others. *Hague v. C.I.O.*, 307 U.S. 496 (1939). But what if a city were to set aside all its parks as tranquil retreats, and deny all persons the right to use them for meetings and speeches?

There are two views. One emphasizes that public streets and parks have traditionally been a public forum – the poor man's printing press available to those who can't afford access to the mass media or the hiring of private halls. Thus, if a city were to bar the public from using streets for parades and parks for meetings, even if it were to do so even-handedly, it would still be necessary to balance the citizen's First Amendment rights to access to the public forum against asserted governmental interests. Thus, a city might bar speeches in a particular area in a park, but not in all its parks. A city might bar nighttime parades in residential areas, but could not ban all of its streets to protest parades. This view is most clearly reflected in the handbill cases, which have struck down across-the-board laws prohibiting all distribution of leaflets in public streets. *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Jamison v. Texas*, 318 U.S. 413 (1943). [And see Justice Fortas' opinion, for himself and two other Justices, in *Brown v. Louisiana*, 383 U.S. 131 (1966), involving a peaceful sit-in at a public library.]

The competing view is that all time, place and manner restrictions on the use of public property are constitutional as long as they are even-handedly applied. This view stresses the impossibility of judicial balancing in particular cases of the interests of the government as landowner and interest of individuals in access to the public forum. If a city has only one small public park, may the city reserve it for those who want peace and quiet? If a town has no business district and is entirely residential, may it deny all the permission to parade? This view is most clearly expressed in Justice Black's opinion for a 5-4 Court in *Adderley v. Florida*, 385 U.S. 39 (1966). The defendants were demonstrators convicted of trespass after they refused the sheriff's order to leave the grounds outside the jail. Justice Black's opinion concluded that: "The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose," 385 U.S. at 48. But elsewhere in his opinion, he emphasizes the narrower considerations that the defendants trespassed in an area not open to the general public, and that the case did not involve use of the public parks and public

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streets. The most recent Supreme Court treatment of the problem is in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), where the Court found that a law prohibiting a noisy demonstration near a school during hours was constitutional. The Court suggested that a public street even next to a school was a public forum but that the freedom to demonstrate ends when "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Free speech may not be restricted more than is necessary but it can be regulated as to time and place to allow the functioning of normal processes. Whether the educational setting gave special force to the rule is an open and interesting question.

Do those who wish to speak, distribute handbills, or picket, have a constitutional right of access to private property, which is open to the public? In *Marsh v. Alabama*, 326 U.S. 501 (1946), the trespass conviction of Jehovah's Witnesses who distributed literature in the business block of a company town was reversed. The corporate owner of the town had barred the distribution of all literature. Justice Black's opinion for the Court emphasized that the company town was like a municipality in all respects, except that it was privately owned. The company town thus was bound by the restrictions placed upon a conventional municipality by the First Amendment.

Marsh was significantly extended in the 5-4 decision in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), which struck down a state court injunction against peaceful labor picketers in a private shopping center. Justice Marshall's opinion argued that the shopping center was just like the business block of the company town. Justice Black, this time in dissent, argued that the significant factor in *Marsh* had been that the entire town was company owned. Another 5-4 decision limited the *Logan Valley* case. In *Lloyd Crop. v. Tanner*, 407 U.S. 551 (1972), the Court held that a state court had improperly enjoined a shopping center from barring the distribution of anti-war leaflets: Justice Powell's opinion distinguished *Logan Valley*, on the ground that in this case the leafleting was unrelated to any activity within the center, and that the leafleters had adequate alternative means of communicating their views.

Motivat: This section of freedom of speech serves as an introduction to the court cases that follow. The students should list items they feel are applicable to symbolic v. pure speech under the following headings: obscene, subversive, libelous, or other.

Reference: See Resource Material

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SPECIAL CASE STUDY: RAY BROWN AND FREEDOM OF EXPRESSION

Directive: To provide students with an opportunity to investigate their own concepts of what the Constitution allows in Amendment I – Freedom of Speech Statement.

Informat: The special case activity is provided on the following pages.

Motivat: This case study activity is designed to demonstrate the viability of the Constitution. Through involvement in the prescribed activity, students will be able to challenge their own preconceptions of freedom of speech and be aware of the various interpretations exhibited by the court throughout history.

The use of this activity will provide the basis for further research into the question of "What is freedom of speech?" It will take three to five days to explore fully the components of this activity.

Reference: See Bibliography, Section B.

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FREE SPEECH AND YOUTH

The following activity was prepared for a workshop on law-related education by Norman Gross of the American Bar Association's Committee on Youth Education for Citizenship, and has been adapted for use here with his permission.

Ray Brown is a senior at Public High School. Ray is black and has been very active in the Afro-American Society during his years at the school which is co-ed and has an evenly balanced racial composition. Ray feels that racism pervades the entire school system and that it is especially evident in the principal of his school. Below is a list of possible methods by which he could express his concern and dissatisfaction.

1. Ray is speaking on the corner near the school calling for the end of racism.
2. Ray, in front of the school, hands out leaflets to the students as they enter the school. The leaflet, in an obscene and violent manner, accuses the school of racism and characterizes the principal as a racist pig.
3. Ray uses a sound truck to express his views in front of the school.
4. Ray pickets in front of the school with a sign saying "End Racism".
5. Ray seeks permission to speak about racism to the student body at a school assembly.
6. Ray buys space in the school newspaper to express his views.
7. Ray gets up at halftime of a basketball game and begins speaking about racism in inter-scholastic athletics.
8. Ray enters the school library and asks for a book on racism in America. When the librarian tells him there is no such book, he sits down and refuses to leave.
9. Ray decides to express his displeasure by refusing to speak at any time during the school day.
10. Ray comes to school dressed like a five-year old declaring, "I will not dress like a man until I am treated like one."
11. Ray enters the school wearing a black armband to protest its racist policies.
12. Ray burns the American flag in front of the school saying, "I will not respect this flag until the U.S. stops its policies of domestic colonialism."
13. Ray throws a rock through a window into the school. On it is written the message "End Racism".
14. When the school committee refuses to replace the principal, initiate black studies, or hire more black personnel, Ray puts a bomb under the building and blows it up.

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Directions:

1. Have students mark each item on the list according to the following designations:

   DP – Definitely Protected
   P – Protected
   NS – Not Sure
   NP – Not Protected
   DNP – Definitely Not Protected

   They are to mark the items on the basis of whether they believe the activities are or are not protected under the First Amendment guarantee of freedom of expression.

2. After doing this, have students design a continuum along which they list the activities to clarify their perception of freedom of speech.

   e.g.

12	1	4	13	6	7	9	8
DP			NS				DNP

3. Have students break into small groups to compare and contrast their individual responses to the above questions. Students should examine the scope of the First Amendment by discussing in the groups why they consider some items more protected than others.

4. After an appropriate amount of time, assign each group one of the incidents on the list and have the students list why Ray would or would not be protected. Also have them indicate what additional facts about the situation are needed to make a decision. They can add further details if relevant: For instance, on item #2, have the group give an example of the limits to which the leaflet could go. Item #6's group should, if possible, visually depict what the space in the school paper would look like.

   Each group should select a representative to speak on its behalf. In the discussion on the items, the following format is recommended:

   a. Presentation by representative of group

   b. Further comments from other members of that group

   c. Dialogue with the rest of the students in the class

   The teacher's role is to guide the discussion and interject pertinent information, especially making reference to the "Free Speech and Youth" cases listed in Section B of the bibliography, p. 119. *(Schenck v. U.S.,* 249 U.S. 47 (1919) is the precedent case for the doctrine of "clear and present danger.")

5. Upon completion of this discussion, write on the board "Congress shall make no law . . . abridging the freedom speech" (from the First Amendment). Conduct a discussion of the meaning and interpretation of the phrase as follows:

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a. What does the phrase mean?

b. What is the problem in dealing with the phrase? (Interpretation of law)

c. What do you mean by interpretation?

d. What is "speech"?, Is it pure?

e. What are the types of speech? (Pure, symbolic, gestures, actions/conduct, silence, appearance)

f. What is "freedom"? (Have them resolve the whole phrase "freedom of speech")

g. Does this conflict with other Constitutional rights?

h. What does "abridge" mean? Why not use another word?

i. "Congress" refers to what? (U.S. Congress – i.e. Federal Government).

j. What about *states* abridging your freedom?

6. Write on the board, "No state shall . . . deprive any person of life, liberty, or property without due process of law" (from the Fourteenth Amendment). Ask the class: Where in this phrase does it indicate that states will not interfere with an individual's right to free speech? ("Liberty" is the key word. The courts have interpreted fundamental freedoms of speech, press, assembly, religion, etc. to be so rooted in our heritage that the word "liberty" expresses the needed language.)

7. This can lead to a discussion of the Constitution as a living document which changes through time. Draw a scale of justice to show the courts must always weigh the rights of an individual versus protection of others.

8. Further thought-provoking discussion:

a. Is freedom of speech really the freedom of dissent?

b. Why would the Founding Fathers guarantee the support of dissenters?

c. Is it the freedom of effective dissent?
(What good is it to make a speech in an empty stadium?)

d. In what ways can we insure that dissenters will be heard?

e. Did the Founding Fathers intend that the individual have enormous freedoms, or was the Amendment designed to provide citizens with a way to voice their opinions on governmental policies? (Were they insuring the essence of democracy from a power point of view?)

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FREEDOM OF SPEECH – INTERNAL ORDER

The legal controls designed to protect society take three major forms:

I. In the first form, the government attempts to prevent in advance communication or other conduct which it fears may lead to public disorder.

- A. Devices
  1. Licensing or permit systems
  2. Court injunctions
- B. Considerations
  1. Doctrine against prior restraint (censorship) – clear and present danger test
  2. Due process requirements
     - a. Law must be definite, specific, and clear
     - b. Cannot contain undue breadth of restriction
     - c. Cannot give individual unfettered discretion

II. In the second form, the government tries to halt communication while it is still in progress (e.g., where the police order a speaker to desist or a crowd to disperse).

III. In the third form, the government prosecutes communication which has already taken place.

- A. Devices for II and III
  1. Unlawful assembly
  2. Inciting to riot
  3. Breach of the peace
  4. Disorderly conduct
- B. Considerations
  1. Due process requirements
  2. Was the law reasonable (were there other alternatives which would not infringe upon freedom of speech)?
  3. Was the law designed to stifle the free exchange of ideas?
  4. Was the enforcement of the law aimed at stifling freedom of speech?
     - a. Key factors
       1) Time
       2) Place
       3) Manner
     - b. Other factors
       1) Speaker
       2) Subject of speech
       3) Number of demonstrators and observers
       4) Composition of crowd
       5) Noise Level
  5. Doctrine of equal protection

00068

OBSCENITIES: *ROTH* v. *UNITED STATES*

Directive: To provide the students with a knowledge of the meaning of speech and obscenity.

Informat: In today's society there is a growing concern or obsession with sex, pornography, etc., commonly classified as obscene.

A dictum in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942), stated that certain classes of utterances are of such slight social value that their punishment raised no constitutional issue. *Chaplinsky* itself dealt with "fighting words." But, included in the list of classes of speech beyond the constitutional pale were "the lewd and the obscene." The Supreme Court seized upon the *Chaplinsky* dictum in *Roth v. United States*, 354 U.S. 476 (1957), to conclude that obscenity was not constitutionally protected speech. The clear agreement among all the Justices, except Black and Douglas, that obscenity could be punished, began the obscenity controversy rather than ended it. The Court insisted in *Roth* that the issue, whether a particular work was obscene, was itself a constitutional question. It was not foreclosed by application of the obscenity label by the lower courts. The inability to agree upon the definition of obscenity has marked the area ever since *Roth*, evidenced by the frequent inability of the Court to agree upon a majority opinion. (In 13 cases between 1957 and 1968 in which the Court wrote signed opinions in obscenity cases, the Justices produced 55 separate opinions.)

One reason for the elusive nature of the definition is the equally elusive nature of the governmental interests which justify the punishment of obscenity. The argument that obscenity is controlled because of the danger it presents to individual and community moral standards is foreclosed by the Court's decision that a work may not be classified as obscene because of the immorality of the ideas which it expresses. *Kingsley International Pictures v. Regents*, 360 U.S. 684 (1959). The argument that obscenity must be limited because it produces unlawful sexual behavior has, of course, been much disputed as an empirical proposition. Moreover, if this were the explanation for the special constitutional position of obscenity, it is difficult to explain the Court's decision that the private possession of obscene materials may not be punished. *Stanley v. Georgia*, 394 U.S. 557 (1969). Nor is it easy to square this argument with the developing case law that regulation of some forms of sexual behavior itself is precluded by a constitutionally protected right of privacy. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Roe v. Wade*, 93 S. Ct. 705 (1973) (abortion).

The President's Commission on Obscenity concluded a few years ago that two rationales suggested the legitimacy of some control over obscenity – the protection of minors, and the prevention of displays offensive to those involuntarily exposed to them. Both rationales fit uneasily into the existing decisions. Protection of juveniles does not justify reducing adults to reading only that which is fit for children. *Butler* v. *Michigan*, 352 U.S. 380 (1957). The Court has permitted the state to punish those who distribute to children harmful matter which could not be classified as obscene if sold to an adult. *Ginzberg* v. *New York*, 390 U.S. 629 (1968). If a lesser standard of obscenity is permissible in the case of material sold or displayed to minors, however, the issue remains – lesser than what?

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A verbal formula that would best summarize the Court's definition of obscenity would contain these elements: the work must be viewed as a whole; it must appeal to a prurient interest; it must be totally without redeeming social importance; it must offend contemporary community standards. The requirement that the work be wholly without redeeming social importance is seriously qualified by the concept that if the work has only slight redeeming social importance, the defendant may still be punished if he "pandered" (commercially exploited for the sake of prurient appeal) the work. *Ginzberg* v. *United States,* 383 U.S. 563 (1966); *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966). The requirement that the work offend contemporary community moral standards has been, of all criteria, the most elusive. Those standards have been in rapid flux and vary widely across the United States. Any individual's judgment of what those standards are, or ought to be, will vary widely from another's. There are serious questions as to whether the United States Supreme Court can, or should, second guess lower federal and state court decisions as to whether a particular work is offensive. The precise manner in which these elusive standards will be affected by the Court's decisions in *Miller* v. *California,* 93 S.Ct. 2607 (1973); *Paris Adult Theatre* v. *Slaton,* 93 S.Ct. 2628 (1973); *United States* v. *Orito,* 93 S.Ct. 2674 (1973); *Kaplan* v. *California,* 93 S.Ct. 2680 (1973), merits close attention.

Motivat: The case for this section is *Roth* v. *United States* dealing with the publication of pornographic literature. The students should be asked to re-examine the definitions they devised in section 4-1 (what is obscenity) in light of this case and develop answers to these questions:

1. Would you classify this case as a libel case, an obscenity case, a subversion case, or a time, place, and manner case? Why?

2. What do you think the trial judge meant when he said "highly prudish"?

3. Do you think the First Amendment should protect any reference to sex in a book, magazine, or photo? Why? Should the amendment distinguish between sex and obscenity? If so, explain both why and how.

4. How would you define "obscene, lewd and lascivious"?

5. Do you agree with the trial judge that the test for an illegal reference to sex in a publication should be whether it arouses the average person in the community?

ROTH v. UNITED STATES

Samuel Roth ran a mail-order business in New York. He published and sold books, magazines, and photographs. These, however, were not ordinary, front-counter bookstore items; they were packed with lurid sex. Roth mailed smutty circulars to lure potential customers. Some of these advertisements were answered by government agents.

Samuel Roth was arrested and charged with violating an 1872 federal law against sending pornography through the mails. The statute declared unmailable "every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, or publication of an indecent character."

At Roth's trial in a federal district court, the judge instructed the jury:

1. "The words 'obscene, lewd and lascivious' as used in the law signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts."

2. "The test is not whether it would arouse sexual desires or sexual impure thoughts in those [making up a part] of the community, the young, the immature or the highly prudish – or would leave another [part], the scientific or highly educated or the so-called worldly-wise...unmoved....The test in each case is the effect of the book, picture, or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community."

After the jury found Roth guilty, the judge sentenced him to five years in prison and over $5,000 in fines. The case eventually came before the U.S. Supreme Court, where Roth claimed that the 1872 federal law violated the First Amendment to the U.S. Constitution. He included among his arguments:

1. That the statute punished the stirring up of merely impure sexual *thoughts* and that there was no proof that such books, magazines, and photos would lead to anti-social conduct.

2. That the statute was too vague – the words "obscene, lewd and lascivious" were not definite enough to clearly tell the difference between a legal publication and an illegal one. And that, said Roth, was necessary to permit him a fair trial.

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LIBEL: *NEW YORK TIMES* v. *SULLIVAN*

Directive: To provide the student with an understanding of defamation or libel.

Informat: The *Chaplinsky* dictum mentioned in the previous obscenity section listed, among the categories of expression beyond constitutional protection, "the libelous." But, in approaching the constitutional issues in defamation cases, as contrasted to the obscenity cases, the Court has insisted that even concededly libelous speech be given a significant measure of constitutional protection. Since *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), most legal issues in even a routine private libel action have a constitutional dimension.

In *Sullivan,* the Court held that private libel actions against public officials were not actionable unless the libelous matter was deliberately false, or the defendant was recklessly indifferent to its probable falsity. In 1967, the same principle was extended to libel of persons who were not public officials but were public figures involved with public issues. *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker,* 388 U.S. 139 (1967). And, in 1971, the Court was in agreement that significant constitutional protection should be attached to the case of libel of someone who was not a public figure, but was involved in a newsworthy event. *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971). In the *Rosenbloom* case, however, the Court was divided as to the issue whether the full scope of the privilege applied in *New York Times* v. *Sullivan* to libel of public officials should be applied to libel of a private citizen involuntarily involved in a newsworthy event. In 1973, the Supreme Court agreed to review a decision which appears to raise again the problems of libel of a private person.

Motivat: The students should read the case study provided and, via discussion, attempt to answer the following questions:

1. What would the difference be between your taking space in the local paper to say derogatory things about your next door neighbor, and criticizing the Mayor of the city for neglecting some of his duties?

2. Is it necessary to prove that every statement in a signed editorial or advertisement be true before the paper prints it? What would the effect of such a policy be on the freedom of the press?

3. When he assumed public office, did Sullivan relinquish any of his rights?

4. What are the advantages of a totally free press? What recent occurrences have illustrated the effect the press can have on government?

Reference: *Beauharnais* v. *Illinois,* 45U.S. 250 (1952)
Rosenblatt v. *Baer,* 383 U.S. 75 (1966)
Associated Press v. *Walker,* 388 U.S. 130 (1967)

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NEW YORK TIMES COMPANY v. *SULLIVAN*

On March 29, 1960, the *New York Times* carried a full page advertisement headlined "Heed Their Rising Voices," an appeal for public understanding and support of the blacks' problems in the South. It described specific acts of discrimination and physical violence against blacks by Montgomery, Alabama, police and by other "Southern violators." It also appealed for money to support the non-violent student movement, the struggle for the right to vote, and to help pay for the legal defense of Dr. Martin Luther King, who was facing perjury charges in Montgomery.

The opening statement was:

> *As the whole world knows by now, thousands of Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.*

The advertisement went on to charge that:

> *[I]n their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom....*

The specific events described to back up these charges included:

> *In Montgomery, Alabama, after students sang, "My Country 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.*
>
> *Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home, almost killing his wife and child. They have assaulted his person. They have arrested him seven times – for "speeding," "loitering," and similar "offenses." And now they have charged him with "perjury" – a felony under which they could imprison him for ten years.*

Although other charges were made and grievances aired in the advertisement, no specific names of the "Southern violators," policemen, or other officials were given.

The cost of the advertisement was approximately $4,800 and it was published by the *Times* under an order from a New York advertising agency acting for the signatory Committee. A letter from A. Philip Randolph, Chairman of the Committee, accompanied the copy, certifying that the persons whose names appeared in the ad had all given their permission. Mr. Randolph was known to the *Times'* Advertising Acceptability Department as a responsible person. With the exception of Randolph, however, none of twenty persons whose names had appeared on the bottom of the ad had given their permission.

The *Times'* staff made no other attempt to verify the accuracy of the advertisement or the authorization for the signers' names. The ad was inaccurate in some of its charges.

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- *The black students on the Alabama campus had sung the National Anthem, not "My Country 'Tis of Thee;"*
- *The campus dining hall had never been padlocked;*
- *Although police had been sent to the campus, they never had completely surrounded or "ringed" it.*

L.B. Sullivan, Commissioner of Police of Montgomery, said that the bombings of King's home had taken place before he had become Commissioner. Sullivan also said that he knew two people who associated him with the ad. One of them had told Sullivan that he "would not want to be associated with anyone who had been a party to such things as stated in the ad." The other had said that "one would not re-employ Sullivan if he believed that he allowed the Police Department to do the things that the paper said."

The circulation of the *New York Times* the day the advertisement was carried was about 650,000. Of these approximately 394 copies were circulated in Alabama and about 35 copies were distributed in Montgomery.

VERDICT ON DISSENT

VERDICT ON DISSENT: A READING

Directive: To provide the student with an opportunity to examine an article relative to the importance of dissent and subversion in a democracy.

Informat: The selection "Verdict on Dissent," by Joel F. Henning, as it appeared in the *Chicago Sunday Sun-Times* Viewpoint, February 18, 1973, is provided for this activity.

Motivat: Students should answer the following questions:

1. Why is dissent important in a democracy?
2. Where is dissent mentioned in the Constitution?
3. What is the meaning of subversion?
4. Is a free press mandatory for dissent?
5. Is there a limit to what is dissent?
6. How can dissent be expressed?

Reference: Freedom of Expression: Historical Aspect, page 43.

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VERDICT ON DISSENT

by Joel F. Henning

"The life of the law," said Justice Oliver Wendell Holmes, "has not been logic; it has been experience." Law is not determined as much by reason, Holmes added, as by "the felt necessities of the time...even the prejudices which judges share with their fellow men."

In the history of the United States, there has been no political experience more bitterly disputed than our great military involvement in Vietnam – except, perhaps, the Civil War. An examination of the major political trials it had engendered, therefore, tells us much about how the U.S. legal system responds to the conflict between the "felt necessities" of government, on the one hand, and of citizens, on the other.

Thus far, four major political trials have arisen directly out of protests against the Vietnam War. The first three are commonly known as the trials of Dr. Spock, the Chicago Seven, and the Harrisburg Seven. The fourth, in which Daniel Ellsberg and Anthony Russo, Jr. have been indicted for publishing the Pentagon Papers, is now in process and, therefore, not discussed here. The first three cases are more or less closed and involve a number of common elements that make them a useful set to examine together.

In the Spock case, Dr. Benjamin Spock; the Rev. William Sloane Coffin, Jr., chaplain of Yale University; Marcus Raskin, a former Kennedy administration official and co-director of the Institute for Policy Studies; Mitchell Goodman, a New York writer; and Michael Ferber, a 23-year-old Harvard University student were indicted for "a continuing conspiracy to aid, abet and counsel violations of the Selective Service law."

In the Chicago case, David Dellinger, a pacifist since before World War II; Rennie Davis and Tom Hayden, nonviolent anti-war activists; Abbie Hoffman and Jerry Rubin, organizers of the relatively nonpolitical but culturally "revolutionary" Yippies; John Froines and Lee Weiner, college teachers; and Bobby Seale, an official of the Black Panther Party, were indicted for having undertaken to "combine, conspire, confederate and agree together...to travel in interstate commerce with the intent to incite, organize, promote, encourage, participate in and carry on a riot...and thereafter to perform overt acts for the purpose of inciting a riot," in Chicago during the 1968 Democratic Convention. Seale's case was severed from the others during the trial and ultimately dropped, reducing the original Chicago Eight to Seven.

In the Harrisburg Seven case, the Reverends Phillip Berrigan, Joseph Wenderoth, and Neil McLaughlin, Roman Catholic priests; Sister Elizabeth McAlister, a Roman Catholic nun; Anthony and Mary Scoblick, an inactive priest and former nun, now husband and wife; and Dr. Eqbal Ahmad, a Pakistani scholar, were indicted for conspiring to "maliciously damage and destroy, by means of explosives, personal and real property owned and possessed by the United States" and "to willfully seize, confine, inveigle, decoy, kidnap, abduct and carry away in interestate commerce a person (Henry Kissinger) for ransom and reward...."

Father Berrigan and Sister McAlister also were charged with unlawfully smuggling letters in and out of the federal prison where Father Berrigan was serving a term for an earlier act of protest against the war. A second indictment, in which the kidnaping charge was minimized and draft board raids given a prominent role, superseded the first. An eighth defendant, Theodore Glick, was severed from the case before trial.

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All but Raskin were convicted in the Spock case. However, Spock and Ferber were freed outright by the U.S. Court of Appeals on a finding of insufficient evidence of conspiracy; the cases against Goodman and Mr. Coffin were remanded for retrial on a finding that the trial judge's instructions to the jury were defective. The government has not sought to retry them.

All the Chicago Seven defendants were acquitted of the conspiracy charges. The U.S. Court of Appeals reversed their convictions on the substantive charge of crossing state lines with intent to incite riot, ruling prejudicial conduct on the part of the judge and prosecutors. The defendants appealed the constitutionality of the statute under which they were convicted, and the government has announced plans not to retry them.

In Harrisburg, the jury failed to reach a verdict on the conspiracy charges, and the government since has dropped the case. The only convictions, those of Father Berrigan and Sister McAlister for smuggling letters, are on appeal.

Nature of Political Crimes

What is a political crime? How is it different from other crimes? Very simply, a political crime is one in which the defendants, rightly or wrongly, believe that the government is in error while they are on the side of justice.

For example, William Penn was indicted in England in 1670 for conspiring to incite a riot. In fact, he merely had preached a Quaker sermon in the street, having been forbidden to do so in the Quaker meeting house under a law prohibiting "unauthorized preaching." Penn believed in the rightness of his cause. This trial led to his imprisonment – and that of the jury that acquitted him – for contempt of court. Seeking freedom from such intolerance, he emigrated to the United States.

Many Americans have been jailed for income-tax evasion. Most such cases are not political. But when Henry David Thoreau was tried for failure to pay his taxes, he defended himself by arguing that the government was wrong in collecting them. When Ralph Waldo Emerson visited Thoreau in jail he asked, "Henry, what are you doing in here?" Thoreau responded, "Ralph, what are you doing out there?"

Similarly, the defendants in the political cases arising out of the Vietnam War believed that the United States was morally and perhaps legally wrong to be involved militarily in Vietnam. Clergymen who believe deeply in the immorality of the war have been defendants in two of the cases under discussion. All defendants agree with those lawyers and legislators who have made arguments against the legality of the war.

Prof. Telford Taylor of Columbia University's Law School, formerly U.S. chief counsel at the Nuremberg war-crimes trials after World War II, has written a book suggesting that the Vietnam War may violate the international laws we established in trying German officials after World War II.

Others, including many U.S. senators, contend that our Constitution has been violated because Congress never has declared war on North Vietnam. Three Presidents, however, saw fit to commit our military power in Vietnam, supported by their own moral conviction as well as legal briefs in defense of their actions. Whether Penn, Thoreau and the critics of our policy in Vietnam were right or wrong, their belief in the rightness of their actions rendered their cases political.

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Being political cases, however, does not necessarily mean that they should receive special treatment. Former Attorney General Ramsey Clark, a deeply moral man, was in charge of the Justice Department when the Spock case was tried, but he agreed to be a defense witness in the Chicago Seven case and was a principal defense attorney in the Harrisburg case. He believed himself on the right side in each case, saying:

"One could believe that Spock was morally right – as I may have, in fact – and still believe that the laws had to be enforced. As the nation's chief law-enforcement officer, I had the duty to prosecute Spock and the others when, in my judgment, the facts showed a violation of the law (aiding and abetting violations of the Selective Service Act). If you don't enforce the law, it becomes shapeless."

In the Chicago and Harrisburg cases, Clark believed not only in the moral rightness of the defendants' causes but in their legal innocence as well. Agreeing with the conclusion of a presidential commission that the police largely incited the riots, he urged that only police be indicted in Chicago. In Harrisburg, he said, "There was no conspiracy. There was no agreement. There was no capacity. They could not do it."

Apparently Clark would have had no more problem with Thoreau than he did with Spock. "It never seemed wrong to me," he said, "that Thoreau...went to jail. That was his point. He so disagreed with the government that he would sacrifice freedom itself to show his concern."

What does the moral man who respects the law do? Were the men who violated the law during the Boston Tea Party right or wrong? What of all the revolutionaries of 1776?

Abraham Lincoln went further than Clark when he asserted that law could and should give way to "the ultimate justice of the people." Would he have prosecuted Spock? Not on the basis of the above-quoted statement. However, later in his career, President Lincoln suspended the writ of habeas corpus, drastically diminishing the rights of Civil War protesters.

These are troubling questions that have no simple answers, but they are important questions to keep in mind when examining the cases under discussion.

How Political Cases Are Born

The political nature of these cases is demonstrated by their unusual origins. Such cases are not typically provoked by a particular criminal act committed by the defendants but by a decision made in government that it is time to move against political dissidents. Each of the three cases under discussion was prosecuted against the advice of knowledgeable government attorneys. All three indictments were apparently motivated by the need to assuage the feelings of powerful government officials.

John Van De Kamp, head of the special Justice Department unit that brought the Spock indictment, is quoted by Jessica Mitford in her book, *The Trial of Dr. Spock*, as saying, "It was done to provide a graceful way out for Gen. (Lewis) Hershey," who had just been publicly rebuked for attempting to abuse the Selective Service system to discourage lawful anti-war protests.

The Chicago Seven indictments were brought by a grand jury over which Mayor Daley's close friend and political ally, the chief judge of the U.S. District Court in Chicago, exercised rather extraordinary influence in opposition to the judgment of the attorney general of the United States. The conclusion seems inescapable that the case was brought to redeem Daley's reputation.

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The Harrisburg indictment was precipitated by premature allegations made before Congress by J. Edgar Hoover, director of the Federal Bureau of Investigation, concerning the alleged kidnaping scheme and the plot to blow up government heating tunnels.

Several members of Congress demanded that Hoover retract his statement or bring indictments. Less than a month later, the hastily prepared indictment was handed down. Later it had to be withdrawn and replaced by a more craftsmanlike document, which nevertheless proved inadequate to the task of substantiating Hoover's charges.

Another Conspiracy Concept

Another common feature of political trials is use of the law of conspiracy. All these cases were principally cast as crimes of conspiracy. According to the trial judge in the Spock case, "a conspiracy may be defined as a breathing together, a plan, or agreeing together." This seems rather a broad and ineffable definition of a crime, and so it has seemed to many jurists.

Supreme Court Justice Robert H. Jackson called conspiracy an "elastic, sprawling and pervasive offense...so vague that it almost defies definition." The great defense lawyer, Clarence Darrow, was less charitable in his definition. He called it a "worn-out piece of tyranny, this dragnet for compassing the imprisonment and death of men whom the ruling class does not like."

One needn't do anything to be guilty of conspiracy. As Darrow put it, if one boy steals candy, he is guilty of a misdemeanor. If two boys plan to steal candy but don't do it, they are guilty of conspiracy – a felony.

The concept of conspiracy entered English law in the 14th Century to protect citizens against false accusations. It was used widely in England and the United States against trade unions and more recently against combinations of businessmen in restraint of trade.

Conspiracy law is justified by the argument that an individual who thinks about robbing a bank is likely to think better of it, but two or more persons who agree to rob a bank are more likely to do it. The danger of conspiracy law is that the government can punish defendants for a substantive crime without proving that a substantive crime was committed. It need only establish the conspiracy.

Thus, Julius and Ethel Rosenberg were electrocuted not for stealing atomic secrets, for which the evidence was insufficient, but for conspiring to do so. During the height of the cold war, Communist defendants were convicted of conspiracy to advocate the overthrow of the government. Hence they were two steps away from doing anything. As Robert O'Rourke, in his book, *The Harrisburg Seven & the New Catholic Left*, describes the Harrisburg indictment, "The conspiracy charge they are left with is as faint from the deeds it implies as a Xerox of a Xerox of a Xerox."

The defendants to a conspiracy charge need not even know each other, but each member of a conspiracy becomes liable for all the statements and actions of every other member. It is sufficient if A is proved to know B, who knows C, and they are engaged in common activity. In all three cases under discussion, some of the defendants had to be introduced to one another for the first time by their attorneys. Lack of the defendants' ability to agree on trial tactics or even luncheon menus was apparent in all these cases and belied their ability to conspire effectively.

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Another extraordinary factor of conspiracy prosecution is that all the government need prove are entirely innocent circumstantial acts, such as phone calls or chance encounters. It need not prove that any inherently wrongful acts were committed.

The extremes to which a government so disposed could take conspiracy law is provided by the Spock trial. One of the "overt acts" alleged against the defendants was a newspaper ad urging all to resist the Vietnam War, signed by 28,000 persons. All signers could have been indicted.

The prosecutor offered evidence against Spock and Raskin to the effect that they had applauded speeches by one another and by the other defendants. Ms. Mitford asked the prosecutor if that meant that all who have applauded such speeches at peace rallies are technically guilty of conspiracy.

"That is substantially correct," answered the prosecutor.

Beyond its legal reach, the concept of conspiracy has psychological implications for a government attempting to gain political advantage over dissidents. When the acts of dissidents are politically offensive but not, perhaps, criminal, it is difficult to convince the public of the defendants' guilt. Conspiracy charges, however, carry the implication that the defendants are making plans and carrying them out in secret.

Even if the government loses its case in court, the charges themselves suggest that the defendants are guilty but cunningly able to conceal their guilt in the dark recesses of their conspiracy. The American people believe deeply in the presumption of innocence until guilt is proven. But a charge of conspiracy can cloud that presumption by raising doubts about the openness and honesty of the defendants.

There are compelling tactical reasons, therefore, why conspiracy is "that darling of the modern prosecutor's nursery," as Judge Learned Hand remarked. But there are other, more ominous reasons as well. The U.S. Constitution has provided a system of self-government in which the people protect their own rights and choose their own political leaders. The success of this system rests largely on the First Amendment guarantee of freedom of speech.

Free speech distinguishes our democracy from the totalitarian regimes of China and the Soviet Union. But when opposition to Vietnam became loud and insistent, Rep. F. Edward Hebert (D-La.) spoke for many who felt threatened when he said:

"Let's forget the First Amendment. When is the Justice Department going to get hep and do something to eliminate this rat-infested area? At least the effort can be made."

The Spock defendants were accused in the main of making statements and speeches (although some of them collected draft cards). With insignificant exceptions, evidence of the Chicago conspiracy involved only speeches and writings. No evidence concerning the Kissinger kidnapping and the bombings was ever presented in Harrisburg that went beyond desultory dinner-table conversation and incidental gossip in love letters.

Of course, the right of free speech is not absolute. One cannot falsely yell fire in a crowded theater. Such speech amounts to criminal action.

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It may be that the Spock defendants could have been found guilty in a case charging violation of the law that prohibits aiding, abetting and counseling violations against the Selective Service system. The government could argue that speeches urging young men to refuse induction come close enough to yelling fire in the theater. But the government attempted to make no such case. Instead, the law of conspiracy was used. Judge Frank M. Coffin said in concurring in the decision reversing the Spock convictions that "to apply conspiracy doctrine to these cases is, in my view, ...not consistent with First Amendment principles."

Why, then, did the government do so? Judge Coffin answered this question when he said, "There is the...danger that the casting of the net has scared away many whom the government has no right to catch." The selection of many non-radical, non-young, middle-class professionals and clergymen to be defendants in all three cases seemed to be an effort to chill the desire of others to speak out against the war. The prosecutor at the Spock trial made this threat manifest. When anti-war activist Prof. Noam Chomsky of the Massachusetts Institute of Technology was introduced during the trial, the prosecutor said, "He is not sitting here at the bar as a defendant...today!"

Political trials have a tendency to demean those involved – on both sides – perhaps because political and moral issues are being tortured into a legal framework. Surely, no party to the Chicago Seven case – the judge, the government prosecutors, the defendants – enhanced their respective reputations in the course of that trial. The specter of Seale, bound and gagged, will not quickly disappear from the U.S. consciousness.

The gap between law and morality becomes apparent when defendants attempt to avoid conviction by allowing their attorneys to bend and twist their deeply held moral beliefs. The Rev. William Sloane Coffin's defense in the Spock case was that the acts alleged against him, urging young men to turn in their draft cards, did not hinder administration of the draft law but facilitate it because the violators with student deferments were immediately reclassified 1-A. An ingenious legal argument but one that demeaned the essence of Mr. Coffin's anti-war campaign.

Another issue in political cases is the ethical question involving the use of undercover tactics. In the Chicago and Harrisburg cases, the government relied almost exclusively on testimony of undercover agents and informers. Since in several instances they appeared to be the only members of the so-called conspiracies advocating violence, they might more aptly be termed agents provocateurs.

The use of undercover agents seems less offensive in unambiguously antisocial cases. A professional narcotics pusher, taken in by a policeman posing as an addict-customer, is nevertheless committing a crime. The arguments in favor of entrapping anti-war baby doctors, college professors, students and clergymen – by encouraging them to "escalate" their political protests – seem much less persuasive.

The System Prevails

The outcome of these cases suggests that, with some injustice and much pain and suffering, our legal system does well – even in political cases.

All the convictions have been reversed on appeal in the Spock and Chicago Seven cases. In Chicago and Harrisburg, the jury failed to convict on any counts of conspiracy. This result was especially dramatic because the Harrisburg defendants did not call any witnesses on their own behalf. The Chicago defendants considered the same strategy but ultimately put on a large number of witnesses. Little meaningful testimony was allowed to go before the jury. In view of this and the dubious level of effectiveness achieved by the Chicago defense counsel, they might have fared better had they, too, put on no defense at all.

00082

In Chicago, the U.S. Court of Appeals roundly condemned the government and Judge Julius J. Hoffman for too obviously displaying their political prejudices.

"The demeanor of the judge and the prosecutors would require reversal," the appellate court said, if other errors did not....Judge Hoffman's depreçatory and often antagonistic attitude toward the defense is evident in the record from the very beginning."

The same court earlier had reversed the judges's citations of contempt for the loud and intemperate reactions of the defendants to the hostility of the other side. These contempt citations are to be retried by another judge.

While the cost in time and money to the defendants in all three cases was enormous, they were free to solicit support among their fellow citizens. Ironically, they raised money for their defense by continuing to speak out against the war.

Political acts must not be immune from prosecution when they are criminal, as in the case of Thoreau's tax evasion, and especially so when they are violent, as in the case of the bombing at the University of Wisconsin. But when mere speech is involved, we must not "forget the First Amendment."

We would do well to heed Justice Hugo Black who wrote that "under our system of government, the remedy for (dissenting ideas) must be...education and contrary argument. If that remedy is not sufficient, the only meaning of free speech must be that the revolutionary ideas will be allowed to prevail."

00083

MOCK TRIAL: *TINKER* v. *DES MOINES*

Directive: To provide the student with an opportunity to experience the working of symbolic speech.

Informat: The simulation is provided on pages 79-89.

In Des Moines, Iowa, three students – Christopher Eckhardt, 16, John Tinker, 16, and his sister Mary Beth, 13 – decided in December, 1965, along with their parents and some friends, to wear black armbands all through the holiday season to protest the War in Vietnam and express their public support for a cease-fire. Hearing of the plans, their school principals ruled on December 14 that any student wearing an armband would be asked to take it off. If he or she refused, suspension from school would result until the student returned without the armband. The students knew of the rule; however, Christopher and Mary Beth wore their armbands on December 16, and John wore his the following day. All three were sent home under suspension and did not choose to return to school until after New Year's Day – the length of time of their original plan.

The students took their case to court, and the District Court upheld the position of the school authorities on the grounds that the armbands might have tended to "create a disturbance" in the school. But students in the school had been permitted to wear ordinary political buttons and even an Iron Cross (a traditional emblem of Nazism); so Tinker's lawyers argued that the school was restricting the free expression regarding a particular point of view, namely, opposition to the Vietnam War.

The Supreme Court agreed to hear the case on appeal.

Motivat: The simulation is designed to acquaint students with the functioning of the federal court system. The specific events of the simulation are a district court evidentiary hearing and a Supreme Court case. Through involvement in the prescribed activities, it is hoped that students will gain an increased awareness of the judicial process.

The roles should be assigned to the students one week in advance of the commencement of the simulation. Allow the students sufficient time to research their roles and at least one day of small group discussions to alleviate any problems.

Reference: See Freedom of Expression: Historical Aspect, page 43.

Excerpts of the Supreme Court decision in *Tinker* v. *Des Moines* are on page 91, but should not be referred to or distributed to the students until completion of the simulation activity.

00084

TINKER v. *DES MOINES* SIMULATION

Assignment I: Designation of Roles

One or two lawyers for Tinker
One or two lawyers for School Board
John F. Tinker
Christopher Eckhardt
Mary Beth Tinker
Dennis Pointer
Aaron McBride
Andrew Burgess
Leonard Carr
Leonard Tinker
William Eckhardt
Court Officer
Chief Justice Earl Warren
Justice Hugo Black
Justice William O. Douglas
Justice John M. Harlan
Justice William Brennan
Justice Potter Stewart
Justice Bryon White
Justice Abe Fortas
Justice Thurgood Marshall

The teacher should assume the role of District Court Judge Stephenson and render the decision 258 F. Supp. 971 (1966).

Assignment II: Conferences

The lawyers, during the first two days, and the Justices, thereafter, have the most difficult roles. It will be beneficial if the time can be allotted to review with each of these individuals their perception of the way in which they should portray their roles.

The students who will be witnesses should meet with their respective lawyers to discuss what information each will contribute at the hearing. (If an attorney is available, he could best be used on this day.)

Assignment III: Evidentiary Hearing – United States District Court for the Southern District of Iowa, Central Division

Judge Stephenson presiding.

The lawyers' instructions contain all the information necessary for the trial.

00085

The teacher should allow the lawyers representing Tinker to present their witnesses first. The lawyers for the school board may then cross-examine the Tinker witnesses. The attorneys for the school board may then call their witnesses. The Tinker lawyers may, of course, cross-examine any witnesses presented by the school board.

Assignment IV: Oral Argument Before the Supreme Court

Before the Supreme Court the lawyers may present no witnesses but must present a concise legal argument based upon the facts of the case [although the official "facts" are determined by the trial court], the available legal precedent, and the lawyer's knowledge of what might appeal to at least five justices.

The objective before the Supreme Court is to build a minimum winning coalition of five justices.

During the oral argument, either the Chief Justice or any of the associate justices may, at any time, interrupt the lawyers for the purpose of clarification of any point being offered.

00086

DISTRICT COURT

Judge — Witness Chair

Court Officer

Tinkers & Counsel — Counsel for School Board

WITNESSES

ORAL ARGUMENT

White Brennan Douglas WARREN Black Harlan Stewart

Marshall Fortas

Counsel for Tinkers — Counsel for School Board

"IN CAMERA" SESSION

WARREN

Marshall — Douglas

Stewart — Fortas

Brennan — Black

Harlan — White

00087

Role 1: Lawyer(s) for Tinkers – Dan Johnson

This role may be shared by more than one participant.

Your purpose is to convince the District Court judge that he should grant an injunction, under 42 U.S.C. § 1983, that will restrain the authorities of the Des Moines Independent Community School District from disciplining your clients.

During the evidentiary hearing (similar to a trial court proceeding), you must not only cite the relevant law but also establish "the facts" of the case.

In citing the law, the following cases may be helpful: *Gitlow* v. *New York*, 268 U.S. 652, 69 L.Ed. 1138, 45 S.Ct. 625 (1925) wherein it was determined by the Supreme Court that an individual's right of free speech is protected against state infringement by the due process clause of the Fourteenth Amendment; and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943); *Stromberg* v. *People of State of California*, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532 (1931), wherein it was established by the Supreme Court that the wearing of an arm band for the purpose of expressing certain views is a symbolic act and falls within the protection of the First Amendment's free speech clause.

In particular, you are seeking an injunction under 42 U.S. C. § 1983 (Civil Rights Act).

Since the facts of the case may be as important as the law, you must use those witnesses, and only those who are most likely to establish the facts you would like on the record. You, therefore, would want to call John, Mary Beth, and possibly Leonard Tinker (father), and Chris Eckhardt. You might also consider Chris' father, William, and John's American History teacher, Aaron McBride (fictional character).

In calling these witnesses, you need to stress the fact that your clients acted out of deeply felt convictions and by no means did they wish to display contempt for school authority or did they wish to cause a disturbance.

During your period of cross-examination of the defendants' witnesses, your purpose is to show that the school authorities singled out a particular type of speech concerning a particular topic (the Vietnam War) to prohibit. Your chief concern is to show that the regulation was unreasonable, or could not reasonably be defended as being necessary to the functioning of the school system.

Other cases you may rely upon are *Burnside* v. *Byars*, 5th Cir. 365 F.2d 744, July 21, 1966; and *Blackwell* v. *Essaguena County Board of Education*, 5th Cir. 363 F.2d 749, July 21, 1966, wherein it was held that a school regulation prohibiting the wearing of "freedom buttons" was not reasonable. The Court stated that school officials "...cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution where the exercise of such rights in the school buildings and school rooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars*, 363 F.2d. 749.

Role 2: Attorney(s) for School District – Allan A. Herrick and Phillip C. Lovien

Your purpose is to convince the District Court judge that he should deny the plaintiff's request for an injunction.

At the evidentiary hearing (similar to a trial court proceeding), you must not only cite the relevant law but also establish "the facts" of the case.

In citing the law, the following cases may be helpful: *Dennis* v. *United States,* 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 (1951); *Near* v. *State of Minnesota,* 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931); *Pocket Books, Inc.* v. *Walsh,* 204 F. Supp. 297 (D. Conn. 1962), wherein it was established that the protections of the free speech clause are not absolute; and *United States v. Dennis,* 183 F.2d 201, 212 (2d Cir. 1950), wherein it was asserted that "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Since "the facts" of the case may be as important as the laws cited, you must make every effort to insure that the record displays those facts which you wish to have on the record. In light of this, you would want to call Dennis Pointer (Mary Beth's math teacher), Andrew Burgess (the high school principal), Leonard Carr (the school board president), and perhaps others.

Your prime concern on examination of your witnesses is to display the fact that "there was reason to expect that the protest would result in a disturbance of the scholarly, disciplined atmosphere within the classroom and halls of your schools.

On cross-examination of the plaintiffs, your purpose is only to ascertain if they were aware of the regulation.

Role 3: John F. Tinker

You, your parents, and your friends have been against the American involvement in the Vietnam War from the beginning. You feel that this is no justification for American participation in a foreign "civil war."

You have participated in anti-war protests in the past and, along with your parents and friends, you decided to wear a black armband to school to display your support for the continuation of the Christmas truce and your grief for those who have died in Vietnam.

Mary Beth and Chris wore their armbands on Monday, but you were a little hesitant. However, after Mary Beth and Chris were suspended, you decided to wear your armband on Tuesday. You felt self-conscious because of the stares your armband drew, but you felt determined that it was your right to express your views in this way. After third period, you were called to the principal's office. Upon your refusal to take off the armband, you were suspended.

Role 4: Christopher Eckhardt

A plaintiff, age fifteen, who attended Roosevelt High School.

You wore an armband on Monday, the first day of the demonstrations. You are, perhaps, more than the Tinkers, vocal about your opposition to the war. (See role sheet for No. 3, John F. Tinker.)

Role 5: Mary Beth Tinker

A plaintiff, age thirteen, who attended Warren Harding Junior High School. (See role sheet for No. 3, John F. Tinker; and No. 4, Chris Eckhardt.)

Role 6: Leonard Tinker

You are the father of John and Mary Beth Tinker and completely support their feelings in regard to the Vietnam War. (See role sheet No. 3, John F. Tinker; and No. 5, Mary Beth Tinker.) For further reference, see Justice Black's dissent.

Role 7: William Eckhardt

You are the father of Chris Eckhardt and completely support his feelings in regard to the Vietnam War.

You and your wife gave Chris the idea to wear the black armband. After the school authorities declared the wearing of armbands illegal, you were the first to see the possibilities for a test case on "free speech" grounds. (See also the role sheet for No. 3, John F. Tinker; and No. 4, Chris Eckhardt.)

Role 8: Dennis Pointer

You are Mary Beth Tinker's math teacher. Mary Beth entered your room on the Monday of the demonstration wearing her armband. The armband caused a discussion of the war; it lasted all period and completely disrupted your class.

Role 9: Aaron McBride

You are John Tinker's history teacher. The wearing of the armbands caused no disruption in your class, and you believe that this form of symbolic protest is akin to "pure speech" and as such is protected by the First Amendment.

John is one of your best and most hard-working students; you believe the school board should never have prohibited the armbands.

Role 10: Andrew Burgess

You are the principal of North High School. You heard about the upcoming armband demonstration and called an administration meeting to head off the problem. The administrators, fearing a disruption of the school program, decided to ban the wearing of armbands.

Role 11: Leonard C...

You are the president of the Des Moines school board. You support the decision of the school administrators because the community is deeply divided on the war and you fear any disturbance will lead to a major conflict.

Role 12: Hugo Black

Justice Black is a "New Deal" Democrat and is sometimes termed a populist.

Black was very much a part of the constitutional revolution of the Warren Court, but to brand Black as a liberal and associate him with Justices Douglas or Brennan would be to oversimplify the case and lead to error in interpretation.

00090

Justice Black fought during his entire judicial career for "incorporation" (making the Bill of Rights applicable to the states through the "due process" clause of the Fourteenth Amendment). This struggle often led to his agreement with the liberals. For example, in the censorship cases, Douglas and Black took the same absolutist position that the First Amendment allows no censorship *at all.*

The Justice from Alabama departs from the positions usually taken by the liberal bloc when questions of equality are reviewed by the Court. The equality category of cases commonly includes poverty law, indigents, and protest demonstrations.

Role 13: Byron White

A lawyer who was better known in his college years as a football player, "Whizzer" White was elected to the National Football Hall of Fame.

Justice White graduated from the University of Colorado, attended Oxford briefly as a Rhodes scholar, and then attended Yale Law School.

"Whizzer" practiced law in Denver until he was appointed by President Kennedy to serve under Attorney General Robert Kennedy in the Justice Department.

White was a "New Frontier" Democrat and President Kennedy nominated him to the seat left vacant by the retirement of Justice Charles A. Whittaker. The expectation that White would consistently vote with the liberal block proved to be in error.

White has been termed a moderate, since his actions as a Supreme Court Justice have placed him clearly in the middle of the controversy between the liberals and conservatives on the Court.

Role 14: John Marshall Harlan

Born in Chicago in 1899, Harlan was the grandson and namesake of a Supreme Court Justice. He graduated from Princeton in 1920, Oxford in 1923, and New York Law School in 1924. He was admitted to the bar in 1925, practiced law in New York City, and was appointed to the Supreme Court by President Eisenhower in 1954.

Although his dissents from the decisions of the activist Warren Court won him a reputation as a conservative, he may more accurately be described as a firm believer in the strictly judicial nature of the Court's function. He considered it his duty to decide each case according to the law, as the law had been determined.

Role 15: Chief Justice Earl Warren

The years that Earl Warren presided on the Supreme Court were years of legal revolution. The Warren Court set a new path in race relations *(Brown* v. *Board of Education of Topeka, Kansas)*, wiping out the legal basis for discrimination and, as it happened, helping to release long-suppressed emotional results of racism. It wrote practically a whole new constitutional code of criminal justice, one restraining the whole process of law enforcement from investigation through arrest and trial, and applied the code rigorously to state and local activities formerly outside of federal standards. It greatly restricted governmental authority to penalize the individual because of his beliefs or associations.

00091

Warren favored most of the major changes in constitutional doctrine undertaken by the Court. As a statesman, Warren had a sense of history, an understanding of people and firmness of character. He was open, optimistic, and idealistic without ideology. He saw good in other human beings and he was decisive.

Earl Warren achieved his greatest fame as Chief Justice of the Supreme Court but Warren began his career as a California politician. Prior to his appointment by President Eisenhower to the Court, Warren served as Governor of California.

After he retired from the Supreme Court, Warren revealed, in a televised interview, that he was still a politician at heart when he responded that he felt his most significant decision was *Baker* v. *Carr* because it removed the greatest single impediment to the democratic election of representatives of the people.

Role 16: Thurgood Marshall

Justice Marshall is part of the "activist" and "liberal" section of the Court. He will tend to favor individuals against the state or weak against strong. Marshall spent twenty-five years developing his judicial philosophy while serving as a civil rights lawyer.

Marshall was intimately associated with the modern civil rights movement. His great-grandfather was a Maryland slave and in the year Marshall was born, two Negroes had been lynched near his home. He had been brought up by his parents (his mother taught in an all-black school and his father was a chief steward at a country club) to be very independent in thought.

Thurgood Marshall was admitted to the Maryland Bar in 1933, and his association with the N.A.A.C.P. began in 1935. From that point on, Marshall, as chief counsel, worked for the principles of the N.A.A.C.P. – to advance the interests of black citizens, to secure suffrage, to increase educational and employment opportunities, and to achieve equality under the law.

Role 17: Abe Fortas

Justice Fortas had a broad legal knowledge, sound judgment, and a liberal philosophy. It is not uncommon for Supreme Court Justices to change the character of their legal opinions after their appointment to the bench. Fortas' performance, however, has been entirely consistent with the reputation he had established as a private lawyer. He not only championed the civil rights of the small and often obscure individual but also defended corporate giants such as the Coca Cola Company. He aroused national interest when he defended a number of individuals termed "Security Risks."

Role 18: Potter Stewart

Justice Stewart was appointed to the Sixth Circuit Court of Appeals by President Eisenhower in 1954 and to the Supreme Court in 1958.

After Stewart took his seat on the Supreme Court he frequently cast the swing vote on a court evenly divided between a liberal and a conservative faction. The conservative group in 1958 consisted of Justices Frankfurter, Clark, Harlan, and Whittaker. The liberal group consisted of Chief Justice Warren and Justices Black, Douglas, and Brennan.

00092

The basic difference between these groups related primarily to the Justices' differing views as to the appropriate use of the Court's power to hold unconstitutional the actions of other branches of government. The "liberals" saw the Court as a guardian of individual liberties protected by the Bill of Rights. They tended to interpret the Bill of Rights in a broad fashion.

The conservatives adopted a narrow view of the Bill of Rights and in a situation wherein a choice was necessary between individual liberty and the power of the state, the conservatives supported the power of the state.

In the majority of the cases in which the Court has divided along liberal/conservative lines, and this includes only about half of the "Civil Liberties" cases decided during Stewart's tenure, he has clearly sided with those justices commonly identified as conservatives.

From 1958 to 1961 Justice Stewart was the "swing man" on the Court: the justices divided 5-4 along liberal conservative lines in forty-two cases involving issues of individual liberties – yet, Stewart joined the liberals in only nine cases, such as *Deutch* v. *United States* (1961); *Russell* v. *United States* (1962); *Shelton* v. *Tucker* (1960).

Deutch and *Russell* dealt with citations against witnesses who had refused to answer questions posed by a House Committee. *Shelton* dealt with requirements that teachers list every organization of which they were members, as a condition of employment.

The significance of Stewart's vote was diminished somewhat in 1962 with Frankfurter's resignation and the appointment of Justice Arthur J. Goldberg gave the liberals a fairly solid majority.

Role 19: William J. Brennan

William J. Brennan, Jr. was born on April 25, 1906 in Newark, New Jersey. Brennan graduated from the University of Pennsylvania and Harvard Law School.

Probably the most important force in the judge's early life was his father. Justice Brennan's father worked for the establishment of labor unions in the City of Trenton. When the opportunity arose, the elder Brennan ran for a council seat on the labor ticket. This involvement with the labor movement had the effect of interesting the young lawyer in labor law, an interest which would greatly affect his career.

The future justice gained a partnership in a Newark law firm because of his expertise in labor law. During this partnership, Brennan became involved in a movement that sought the restructuring of the court system in New Jersey. He felt that the court system would be improved if it was consolidated, an idea based on his belief that courts existed to serve the people and to protect their rights. After a considerable battle, the court system was changed to one of general jurisdiction. His appointment to the New Jersey Superior Court in 1949 may have been a result of his work in the reform movement.

Although he was considered a liberal judge while he served on the court, this opinion was perhaps based less on any of his decisions than on his personal belief in the obligations of the citizen. These values forced Brennan to speak out against Senator McCarthy at the peak of the Senator's power.

Having gained national recognition while he sat on the Supreme Court of New Jersey, Brennan was appointed by Eisenhower to the Supreme Court in 1957.

The two most important decisions of Justice Brennan are *Baker* v. *Carr*, and *Katzenbach* v. *Morgan*. The former mandated the use of the famous "one man – one vote" principle in the apportionment of congressional districts by state legislatures and the latter decision well displays the commitment of the Justice to individual liberty.

A speech of the Justice best expresses his feelings in regard to the role of the court: "The constant for Americans, for our ancestors, for ourselves, and we hope for future generations is our commitment to the constitutional ideal of liberty protected by the law....It will remain the business of judges to protect the fundamental constitutional rights which will be threatened in ways not possibly envisaged by the Framers....the role of the Supreme Court will be the same....as the guardians of (constitutional) rights."

Role 20: William O. Douglas

William O. Douglas is the foremost conservationalist, naturalist, and traveler in the history of the Supreme Court. He has written more books, mainly on conservation and travel, than any figure, judicial or otherwise, on the American scene. Douglas is the only individual justice whose picture is likely to appear, as it has in *Field and Stream* magazine singing, "The Song of Sergeant Parker." Commonly referred to as "Bill," he is an experienced fisherman, traveler, and camper.

Douglas has served on the Court longer than any justice in the Court's history. He was appointed to the Supreme Court by F.D.R. in 1939, when he was forty-one. Since his appointment, he has been the foremost exponent of individual liberty and, particularly, of freedom of speech.

"Bill" was born on October 16, 1898, at Maine, Minnesota. His father was a home missionary for the Presbyterian Church. As a small child, Douglas had infantile paralysis. The doctors told him that he would lose the use of both his legs. But he never learned how to be a loser. He hiked the mountains every day to rebuild his limbs.

As he was growing up, he rode freight cars with hobos, shared meals with them, and slept outdoors with them. He has told of his enjoyable experiences in many of his speeches.

William O. Douglas is probably best known for his advocacy of freedom of speech. A good example of this may be found in the *Dennis* v. *United States* case. A group of men were accused of advocating forcible overthrow of the government by organizing a group which in turn would advocate such overthrow. More precisely, the charge was not that the defendants themselves had advocated or organized such action, but that they had conspired and organized to teach others to do so by teaching from books written by Marx, Lenin, Stalin, and others, who in turn were asserted to have advocated forcible overthrow of the government. The statute, as construed and applied to support the conviction of these defendants, was upheld by the majority of the Court. Justice Douglas dissented. He said he would have no difficulty if the defendants had been teaching people to commit sabotage or assassinate the President or plant bombs. But he found no evidence that such a thing occurred. Douglas did this to preserve the right of free speech as an American value.

Douglas is totally capable of doing his judicial work by himself and he uses law clerks probably less than any other Justice. Because of his extraordinary brilliance, he is the fastest worker of any Justice of this century, except perhaps Justice Holmes. The range of his work is vast, running not merely to great constitutional questions, but also to matters of taxation and of business reorganization in bankruptcy, all of which are difficult questions of law.

Douglas can often make his point with just one sentence. An example of this power are his words in a case in which a doctor was excluded from the practice of his profession in New York: "When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us."

Suggested Readings:

An Introduction to Supreme Court Decision Making. Harold J. Spaeth. Chandler Publishing Company, 1972.

The Nature of the Judicial Process. Benjamin N. Cardozo, L.L.D. Yale University Press, 1921.

The Warren Court. Archibald Cox. Harvard University Press, 1968.

Equal Justice Under Law. The Foundation of the Federal Bar Association, 1965.

00095

SUPREME COURT DECISION IN *TINKER v. DES MOINES*

In *Tinker v. Des Moines*, 393 U.S. 503 (1969), symbolic expression was characterized as a "direct primary First Amendment" right "akin to 'pure speech.' " The Court noted that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

A majority of the Court concluded that, since the ban was based on the message communicated by the armbands, and since there was no evidence that wearing the armbands had disrupted school activities, the ban was equivalent to forbidding verbal expression of the students' views during school hours.

In protecting the First Amendment rights of public school students, the Court ruled that speech during school hours may be controlled if school authorities reasonably forecast disruption or material interference with school activities. The opinion, however, noted that the particular armbands were prohibited because of the message they conveyed, and school authorities had not prohibited the wearing of all symbols of political or controversial significance.

Thus, to prohibit the expression of one particular opinion without evidence that it is necessary to avoid material and substantial interference with school work or discipline is unconstitutional.

Excerpts from the majority opinion (written by Justice Fortas):

> *"The school officials banned and sought to punish petitioners for a silent, passive, expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students."*
>
> *"Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the school or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises."*
>
> *"In our system, undifferentiated fear or apprehension of disturbance (the District Court's basis for sustaining the school authorities' action) is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any words spoken, in class, in the lunchroom or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take this risk. ..."*
>
> *"It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol — black armbands worn to exhibit opposition to this Nation's involvement in Vietnam — was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible."*

00096

"If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constituonal rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."

"In the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the constitution's guaranties."

Excerpt from a dissenting opinion (Justice Black):

"While the absence of obscene or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually 'disrupt' the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw it would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam War.

"Even if the record were silent as to protests against the Vietnam War distracting students from their assigned classwork, members of this Court like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam War have disrupted and divided this country as few other issues ever have. Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands."

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RESOURCE MATERIAL

APPENDIX A

SELECTED SECTIONS OF THE UNITED STATES CONSTITUTION

ARTICLE I

SECTION 9.... The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. ...

AMENDMENT I

Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV
(Ratified July 9, 1868)

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ...

00100

APPENDIX B

CARDOZA READING[1]

"History, Tradition and Sociology"

The method of philosophy comes in competition ... with other tendencies which find their outlet in other methods. One of these is the historical method, or the method of evolution. The tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history. I do not mean that even then the two methods are always in opposition. A classification which treats them as distinct is, doubtless, subject to the reproach that it involves a certain overlapping of the lines and principles of division. Very often, the effect of history is to make the path of logic clear. Growth may be logical whether it is shaped by the principle of consistency with the past or by that of consistency with some pre-established norm, some general conception, some "indwelling, and creative principle." The directive force of the precedent may be found either in the events that made it what it is, or in some principle which enables us to say of it that it is what it ought to be. Development may involve either an investigation of origins or an effort of pure reason. Both methods have their logic. For the moment, however, it will be convenient to identify the method of history with the one, and to confine the method of logic or philosophy to the other. Some conceptions of the law owe their existing form almost exclusively to history. They are not to be understood except as historical growths. In the development of such principles, history is likely to predominate over logic or pure reason. Other conceptions, though they have, of course, a history, have taken form and shape to a larger extent under the influence of reason or of comparative jurisprudence. They are part of the *jus gentium.* In the development of such principles logic is likely to predominate over history. An illustration is the conception of juristic or corporate personality with the long train of consequences which that conception has engendered. Sometimes the subject matter will lend itself as naturally to one method as to another. In such circumstances, considerations of custom or utility will often be present to regulate the choice. A residuum will be left where the personality of the judge, his taste, his training or his bend of mind, may prove the controlling factor. I do not mean that the directive force of history, even where its claims are most assertive, confines the law of the future to uninspired repetition of the law of the present and the past. I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future. "If at one time it seemed likely," says Maitland, "that the historical spirit (the spirit which strove to understand the classicial jurisprudence of Rome and the Twelve Tables, and the Lex Salica, and law of all ages and climes) was fatalistic and inimical to reform, that time already lies in the past....Nowadays we may see the office of historical research as that of explaining, and therefore lightening, the pressure that the past must exercise upon the present, and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."

Let me speak first of those fields where there can be no progress without history. I think the law of real property supplies the readiest example. No lawgiver meditating a code of laws conceived the system of feudal tenures. History built up the system and the law that went with it. Never by a

[1] Benjamin N. Cardoza. *The Nature of the Judicial Process* (New Haven, Connecticut: Yale University Press, 1949).

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process of logical deduction from the idea of abstract ownership could we distinguish the incidents of an estate in fee simple from those of an estate for life, or those of an estate for life from those of an estate for years. Upon these points, "a page of history is worth a volume of logic." So it is wherever we turn in the forest of the law of land. Restraints upon alienation, the suspension of absolute ownership, contingent remainders, executory devises, private trusts and trusts for charities, all these heads of the law are intelligible only in the light of history, and get from history the impetus which must shape their subsequent development. I do not mean that even in this field the method of philosophy plays no part at all. Some of the conceptions of the land law, once fixed, are pushed to their logical conclusions with inexorable severity. The point is rather that the conceptions themselves have come to us from without and not from within, that they embody the thought, not so much of the present as of the past, that separated from the past their form and meaning are unintelligible and arbitrary, and hence that their development, in order to be truly logical, must be mindful of their origins. In a measure that is true of most of the conceptions of our law. Metaphysical principles have seldom been their life. If I emphasize the law of real estate, it is merely as a conspicuous example. Other illustrations, even though less conspicuous, abound. "The forms of action we have buried," says Maitland, "but they still rule us from their graves." Holmes has the same thought: "If we consider the law of contract," he says, "we find it full of history. The distinctions between debt, convenant and assumpsit are merely historical. The classification of certain obligations to pay money, imposed by the law irrespective of any bargain as quasi-contracts, is merely historical. The doctrine of consideration is merely historical. The effect given to a seal is to be explained by history alone." The powers and functions of an executor, the distinctions between larceny and embezzlement, the rules of venue and the jurisdiction over foreign trespass, these are a few haphazard illustrations of growths which history has fostered, and which history must tend to shape. There are times when the subject matter lends itself almost indifferently to the application of one method or another, and the predilection or training of the judge determines the choice of paths. The subject has been penetratingly discussed by Pound. I borrow one of his illustrations. Is a gift of movables *inter vivos* effective without delivery? The controversy raged for many years before it was set at rest. Some judges relied on the analogy of the Roman Law. Others upon the history of forms of conveyance in our law. With some, it was the analysis of fundamental conceptions, followed by the extension of the results of analysis to logical conclusions. The declared will to give and to accept was to have that effect and no more which was consistent with some pre-established definition of a legal transaction, an act in the law. With others, the central thought was not consistency with a conception, the consideration of what logically ought to be done, but rather consistency with history, the consideration of what had been done. I think the opinions in *Lumley* v. *Gye*, 2 El. & Bl. 216, which established a right of action against A. for malicious interference with a contract between B. and C., exhibit the same divergent strains, the same variance in emphasis. Often, the two methods supplement each other. Which method will predominate in any case may depend at times upon intuitions of convenience or fitness too subtle to be formulated, too imponderable to be valued, too volatile to be localized or even fully apprehended. Sometimes the prevailing tendencies exhibited in the current writings of philosophical jurists may sway the balance. There are vogues and fashions in jurisprudence as in literature and art and dress. But of this there will be more to say when we deal with the forces that work subconsciously in the shaping of the law.

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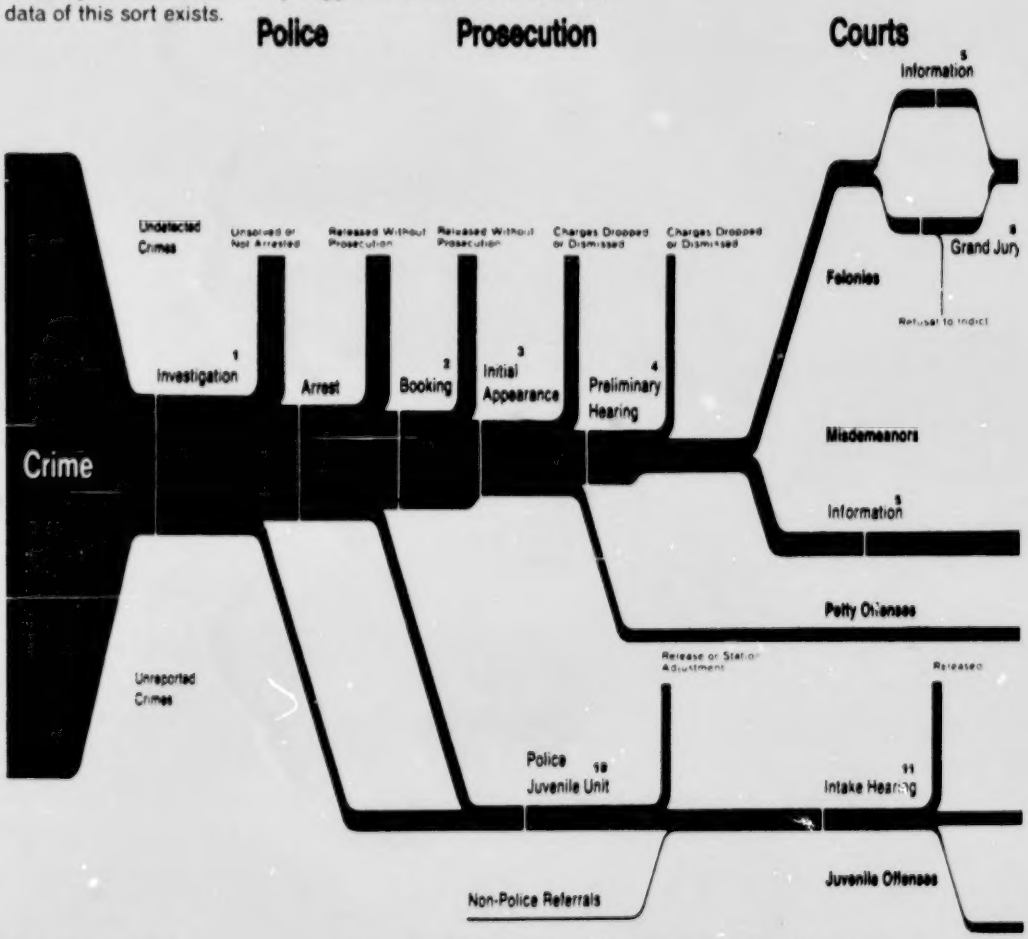
If history and philosophy do not serve to fix the direction of a principle, custom may step in. When we speak of custom, we may mean more things than one. "Consuetudo," says Coke, "is one of the maine triangles of the lawes of England; these lawes being divided into common law, statute law and customs." Here common law and custom are thought of as distinct. No so, however, Blackstone: "This unwritten or Common Law is properly distinguishable into three kinds: (1) General customs, which are the universal rule of the whole Kingdom, and form the Common Law, in its stricter and more usual signification. (2) Particular customs which for the most part affect only the inhabitants of particular districts. (3) Certain particular laws, which by custom are adopted and used by some particular courts of pretty general and extensive jurisdiction."

00103

A general view of The Criminal Justice System

This chart seeks to present a simple yet comprehensive view of the movement of cases through the criminal justice system. Procedures in individual jurisdictions may vary from the pattern shown here. The differing weights of line indicate the relative volumes of cases disposed of at various points in the system, but this is only suggestive since no nationwide data of this sort exists.



1 May continue until trial.

2 Administrative record of arrest. First step at which temporary release on bail may be available.

3 Before magistrate, commissioner, or justice of peace. Formal notice of charge, advice of rights. Bail set. Summary trials for petty offenses usually conducted here without further processing.

4 Preliminary testing of evidence against defendant. Charge may be reduced. No separate preliminary hearing for misdemeanors in some systems.

5 Charge filed by prosecutor on basis of information submitted by police or citizens. Alternative to grand jury indictment; often used in felonies, almost always in misdemeanors.

6 Reviews whether Government evidence sufficient to justify trial. Some States have no grand jury system; others seldom use it.

00104

7 Appearance for plea, defendant elects trial by judge or jury (if available); counsel for indigent usually appointed here in felonies. Often not at all in other cases.

8 Charge may be reduced at any time prior to trial in return for plea of guilty or for other reasons.

9 Challenge on constitutional grounds to legality of detention. May be sought at any point in process.

10 Police often hold informal hearings, dismiss or adjust many cases without further processing.

11 Probation officer decides desirability of further court action.

12 Welfare agency, social services, counselling, medical care, etc., for cases where adjudicatory handling not needed.

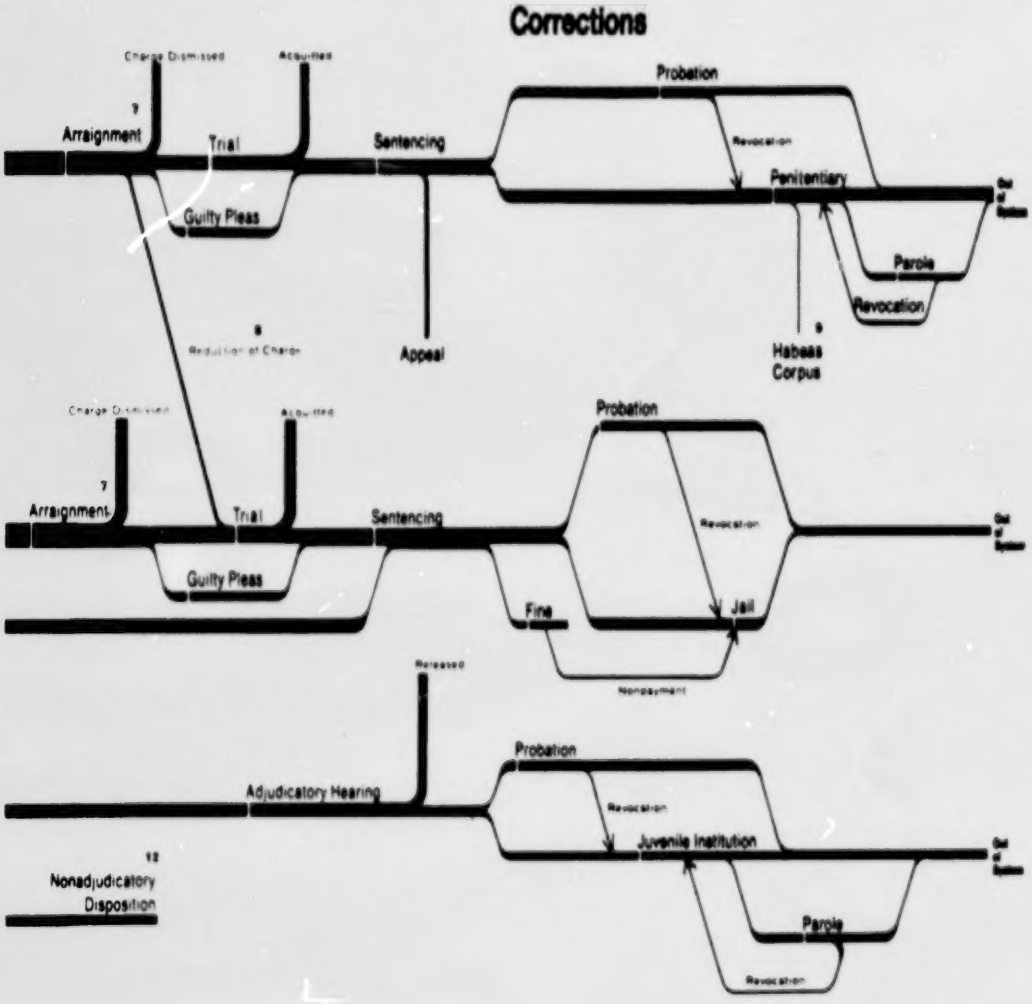


Chart courtesy of: The President's Commission on Law Enforcement and Administration of Justice

00105

D. ADDITIONAL TEACHING STRATEGIES

STRATEGY: POLL

Purpose:

This exercise has been designed to allow students to examine their values concerning the First Amendment rights of freedom of expression. It can be used before a study of these rights as a springboard for discussion, after the study of these rights, or both before and after the study so that value changes or modification may be detected.

Procedure:

The poll on the following page should be given to students who then respond individually. Responses may be tallied and discussed by the whole class or by small discussion groups.

00106

POLL

Instructions:

Select the response which most closely indicates the way you feel about each item..

SA = Strongly Agree
AS = Agree Somewhat
DS = Disagree Somewhat
SD = Strongly Disagree

Item:

_____ 1. In a democracy an individual should be able to say anything he wants to.

_____ 2. There is never justification for government censorship in any form.

_____ 3. The people of the United States really believe in freedom of speech.

_____ 4. Atheists should not be allowed to speak in a public high school.

_____ 5. Any government censorship should be imposed by the Congress.

_____ 6. The President should be allowed to impose censorship during a time of war.

_____ 7. An individual should be allowed to say anything he wishes during a time of war.

_____ 8. Public libraries should not be allowed to have books that have dirty words or pictures in them.

_____ 9. A Communist should not be allowed to speak in a high school.

_____ 10. The President of the U.S. should not allow newspapers to print stories that he thinks are not in the public interest.

_____ 11. I would rather have my minister, priest, or rabbi rather than my parents determine what I should read.

_____ 12. Each community should have a citizen's review board to determine what books or magazines are to be sold by area dealers.

_____ 13. Only religious groups should determine if books, movies, and magazines are obscene or pornographic.

_____ 14. The Supreme Court of the U.S. should determine what books, magazines, and movies should be banned.

_____ 15. Only the Congress should have the right to determine what book stores should or should not sell.

_____ 16. Each community should determine what books, magazines or movies are to be available to the public.

_____ 17. State legislators should determine if a book, movie, or magazine should be permitted to be distributed in that state.

_____ 18. Books on Communism should be banned.

_____ 19. Anti-war demonstrators should not be allowed to demonstrate against the government.

_____ 20. An individual should not be allowed to give speeches in favor of abortion.

_____ 21. When the U.S. is at war, newspapers should not be allowed to carry stories critical of our conduct of the war.

00107

_____ 22. Democratic government is impossible without an informed people.

_____ 23. The news media are a threat to continued democracy in this country.

_____ 24. The government should exercise some control over the "liberal" television news commentators.

_____ 25. Reporters should not be allowed to criticize religion in this country.

_____ 26. Since the President is elected by all of the people, he alone should determine what is in the best interests of the U.S.

_____ 27. Reporters should not be permitted to criticize decisions made by the President or Congress.

_____ 28. Local television stations should monitor network news programs and censor them if they feel that the facts or opinions should not be broadcast to local viewers.

_____ 29. "R" rated movies shown on television should not be censored.

_____ 30. Student and parent boards of review should determine what books should not be permitted in school libraries.

_____ 31. Teachers should be permitted to seize any book or magazine of a student.

_____ 32. School administrators should determine what books and magazines a teacher is permitted to use in the classroom.

_____ 33. Black militants should not be allowed to speak at public rallies.

_____ 34. The Federal Communications Commission should determine the content of programs on the Public Broadcasting System.

_____ 35. Ku Klux Klan rallies which condemn Blacks, Catholics, and Jews should not be allowed.

_____ 36. Educational television should not be allowed to carry programs that depict values that are different from those of most Americans.

_____ 37. Teachers who express unpopular views in the classroom should be fired.

_____ 38. If the evidence shows clearly that the President is guilty of a criminal act, then the people should not be told of this fact for fear that his authority will be undermined in both this country and abroad.

_____ 39. The government should be allowed to classify anything it wishes as secret in the interests of national security.

_____ 40. Most people don't know what's good for them so that the government must see to it that they don't hear or read anything that's dangerous for them to hear or read.

Questions:

Who should control information and censorship?

Who should have free speech, etc? Why?

00108

STRATEGY: CONTINUUM/RANKING

Purpose:

Consideration of the First Amendment to the U.S. Constitution and the issue of civil disobedience.

Procedure:

Mark your position along the series of points along the continuum. Take a general poll of positions first; — then discuss positions.

Most desirable character .....Most despicable character

1. George Wallace's blocking the doors of the state university so that black students couldn't attend (even though the National Guard was present to insure the black student's entry).
2. A ghetto youth's, during a riot, kicking out the window of a neighborhood store and running off with a portable color T.V.
3. Stokely Carmichael's calling for armed revolution by black in U.S. in order to achieve equality in his latest book.
4. A televised news coverage of a Ku Klux Klan rally where the grand dragon called for the mass killing of black and Jews.
5. A black teenager calls a police a White M_____ F_____ Pig, when the police respond to a disturbance of the peace by a large crowd.
6. The white policeman who arrests the fellow in no. 5.
7. A teacher who uses profanity toward a student.
8. A student who uses profanity toward a teacher.
9. Vice-President of the U.S. criticizing news media for one-sided reporting on the President's recent speech.
10. An investigative newsman who refuses to divulge the identify of informants to the prosecutor's office.
11. A demonstration by 2,000 people on the grounds of the work house in protest of the arrest of James Hardy.
12. National Guard called into a university because students have taken over administration office.
13. Federal official who divulges "top secret" documents to newspaper reporters.
14. A policeman receives a call at 8:30 p.m. that there is excessive noise around a church in a neighborhood of elderly persons. He asks a group of teenagers to move down the street to a park that stays open until 11:00 p.m.

Questions:

Who did you select as most desirable? most despicable? Why?

00109

TOPIC: DEMOCRACY AND DISSENT

Springboard – Questionnaire

1. A sit-in that does not interfere with the constitutional rights of others.
2. Anti-war protestors chaining themselves to the courthouse walls.
3. Burning draft records.
4. The publication of top secret government papers (Pentagon papers).
5. Bombing a segregated restaurant.
6. A classroom boycott because a well-liked teacher has been fired.
7. Burning the American flag.
8. Refusal to pay taxes as a protest against the war.

The students should respond to the statements by indicating whether they

1. strongly agree with the action
2. mildly agree
3. mildly disagree
4. strongly disagree
5. no opinion or undecided

Student response should be recorded.

Questions:

1. How have you defined the limits of dissent?
2. When does dissent become unjust (illegal)?
3. Why did the class feel that numbers_____were justifiable and numbers_____were not?
4. Should dissent stop short of violence?
5. Should the end justify the means?
6. Do you agree or disagree with the results of the questionnaire? Why?
7. In which of the above forms of dissent would you become involved? Why? What would be the consequences?

00110

HOW TO FIND LEGAL CASES

Any case which has been adjudicated in a court of law is given a title, reference letters and numbers. The "citation," as it is called, which follows the title of the case (plaintiff v. defendant), indicates what court decided the case and when and where the decision is printed. Therefore, if a teacher or student wishes to consult the text of a decision on a case cited in this manual or elsewhere, he or she should be able to find it in a law library. There are law libraries at all college and university law schools and in the Federal Court Buildings and State House. If still at a loss, there will usually be someone there willing to help a "bewildered layman."

Use the following examples as a guide:

1. *Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).* The letters "U.S." indicate that this case was decided by the United States Supreme Court, the highest court in the Country, and can be found in the United States Reports. From the numbers, it becomes clear that the case is located in Volume 393 of the U.S. Reports at page 503, and that it was decided in 1969.

2. *Richards v. Thurston, 424 F. 2nd 1281 (1st Cir. 1970).* This case is found in volume 424 of the Federal Reporter, Second Series, at page 1281. Cases found in the Federal Reporter ("Fed.") or Federal Reporter, 2nd Series ("F., 2d") were decided by the United States Courts of Appeals, of which there are eleven – one level below the Supreme Court. In this one, the notation within the parenthesis indicates the case was decided by the Court of Appeals for the First Circuit in 1970.

3. *Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967).* The Federal Supplement ("F.Supp.") reports, for the most part, cases from the United States District Courts, of which there are one or more in each state. This case, found in volume 272 of the Federal Supplement at page 947, was decided by the U.S. District Court for the District of South Carolina in 1967.

4. *State Board of Education v. Board of Education, Netcong, 57 N.J. 172 (1970).* Only decisions of the New Jersey State Supreme Court, the state's highest court, are reported in the New Jersey Reports. This particular case can be found in volume 309 of the Reports at page 476, and was decided by the State Supreme Court in 1970.

00111

F. LEGAL GLOSSARY [1]

accomplice. One who knowingly, voluntarily, and with a common interest with others participates in the commission of a crime as a principal, accessory, or aider and abettor.

So far as his criminal liability is concerned, the question is whether he participated as a principal or as an accessory, aider or abettor; the term "accomplice" has no legal significance in deciding the question of his own guilt. Such term becomes significant if he is called as a witness and testifies upon the trial of another person and it is contended that, since he is an accomplice, his testimony is insufficient to support a conviction. 21 Am J2d Crim L §118; 26 Am J 1st Homi §458.

acquittal. A verdict of not guilty of a crime as charged; a setting free from the charge of an offense.

amicus curiae. A "friend of the court," one who volunteers information to a court on a case in which he has no right to appear as a party but in which he has been allowed to introduce arguments, often to protect his own interests.

apparent jeopardy. The status of the defendant in a criminal case on trial before a competent court and a jury impaneled and sworn.

appeal. The review by a higher court of a trial held in a lower court on the complaint that an error has been committed.

appellate court. A court having the power to hear appeals, review the decisions of lower courts, and reverse lower court decisions when they are in error.

arraignment. The act of bringing an accused before a court to answer the charge made against him by indictment, information, or complaint. It consists of bringing the accused into court, reading the charge to him then and there, and then calling upon him to plead thereto as "guilty" or "not guilty."

arrest. The seizing, detaining, or taking into custody of a person by an officer of the law.

attorney at law. One of a class of persons who are by license constituted officers of courts of justice, and who are empowered to appear and prosecute and defend, and on whom peculiar duties, responsibilities and liabilities are devolted in consequence. 7 Am J2d Attys § 1. A quasi-judicial officer. 7 Am J2d Attys § 3.

Of course, the of an attorney is not confined to appearances in court for prosecutions and defenses. A person acting professionally in legal formalities, negotiations, or proceedings, by the warranty or authority of his clients is an attorney at law within the usual meaning of the term. The distinction between attorneys or solicitors and counsel or barristers is practically abolished in nearly all the states. 7 Am J2d Attys § 1. While some men of the profession devote their time and talents to the trial of cases and others appear in court only rarely, the law imposes the same requirements for admission and the same standards of ethics for both classes.

attorney's implied authority. The authority which an attorney has, by virtue of his employment as an attorney, to do all acts necessary and proper to the regular and orderly conduct of the case; being such acts as affect the remedy only and not the cause of action. Such acts of the attorney are binding on his client, though done without consulting him. 7 Am J2d Attys § 120.

An attorney employed to conduct a transaction not involving an appearance in court also has a measure of implied authority, although not in the broad scope accorded that of a counsel in litigation. For example an attorney employed to collect a claim has no implied authority to accept anything except lawful money in payment. Anno.: 66 ALR 116, s. 30 ALR2d 949, § 5.

[1] Compiled in part from James A. Ballentine, *Ballentine's Law Dictionary*, (Rochester, New York: The Lawyers Co-Operative Publishing Company.

attorney's privilege or immunity. The immunity or privilege of an attorney at law against being subjected to arrest or the service of process in a civil action while going to the place of trial of an action in which he appears in his professional capacity, during the trial, and while returning to his office or residence. 42 Am J1st Proc § 140.

bail. The cash or bond security given for a defendant's future appearance in court, thereby releasing the defendant from custody until his hearing or trial.

booking. A police-station term for the entry of an arrest and the charge for which the arrest was made.

breach of the peace. An unlawful violation of the public peace and order by disorderly conduct.

bribery. The crime of offering, giving, or accepting anything of value to influence the behavior of a public official in the performance of his public duty.

brief. A written argument prepared by a lawyer to serve as the basis of his argument before a court.

burden of proof. The responsibility for producing enough evidence to prove the facts in a lawsuit.

burglary. The breaking and unlawful entering of a dwelling (or other structure) belonging to another with the intent to commit a felony therein; also includes attempted forcible entry.

capital crime. A criminal offense for which the maximum penalty is death.

certiorari. A writ, or order, from an appellate court to a lower court requesting for review a record of the proceedings of a trial.

change of venue. A change in the place where a trial will be held.

civil law. One of two broad fields of law, involving legal disputes between private individuals.

common law. The body of legal principles based on precedents set by court decisions rather than on statutes passed by legislatures.

concurring opinion. An opinion filed by an appeals judge or a justice of the Supreme Court, agreeing with other opinions in the case but giving differing reasons for so concurring.

confession. A voluntary admission, declaration or acknowledgment by one who has committed, a felony or a misdemeanor that he committed the crime or offense or participated in its commission; a voluntary admission or declaration of one's agency or participation in a crime. 29 Am J2d Ev § 523.

A confession is voluntary when made of the free will and accord of the accused, without fear or threat of harm and without hope or promise of benefit, reward, or immunity. 29 Am J2d Ev § 529.

conviction. A verdict of guilty in a criminal case.

criminal homicide. The unlawful taking by one human being of the life of another in such a manner that he dies within a year and a day from the time of the giving of the mortal wound. If committed with malice, express or implied by law, it is murder; if without malice, it is manslaughter. No personal injury, however grave, which does not destroy life, will constitute either of these crimes. The injury must continue to affect the body of the victim until his death. If it ceases to operate, and death ensues from another cause, no murder or manslaughter has been committed. Commonwealth v. Macloon, 101 Mass. 1.

criminal law. One of two broad fields of law, involving legal action taken by the state against a person accused of committing a crime or offense against society.

cross-examination. In a legal proceeding, the close questioning of one party's witness, by an attorney for the opposite side, to test the truth of the testimony he has given.

de facto. In fact; in deed; actually so, but not sanctioned by law.

defendant. The accused in a criminal case or, in a civil suit, the party sued by the plaintiff.

de jure. According to law; by right; by lawful title.

dismissal. An order for a termination of a case without a trial, freeing the defendant without a verdict.

dissenting opinion. A court opinion delivered by one or more judges or justices, disagreeing with both the ruling and the reasoning of the majority opinion.

double jeopardy. Twice subjecting an accused person to the danger inherent in a trial for a criminal offense. (Citizens are protected under the Fifth Amendment against being tried twice for the same crime.)

due process of law. All the proper steps required for a fair hearing in a legal proceeding, guaranteed in the United States by the "Bill of Rights" and the Fourteenth Amendment to the Constitution.

equal protection of the laws. The constitutional requirement, guaranteed by the Fourteenth Amendment, that all persons in like circumstances are entitled to equal treatment by the law and, especially, in legal proceedings.

evidence. Any of the various types of information – including testimony, documents, and physical objects – that a court allows a lawyer to introduce in a legal proceeding in order to attempt to convince the court or jury of the truth of his client's contentions.

exoneration. Absolving of a charge or imputation of guilt; the lifting of a burden; a discharge; a release from liability; the application of the personal property of an intestate to the payment of his debts and the relief of his real property therefrom. 21 Am J2d Ex & Ad § 391.

ex parte. In law, a term used to describe a legal proceeding undertaken for or on behalf of one side only.

felony. A generic term for any of several high crimes such as murder, rape, robbery, for the purpose of distinguishing them from less serious crimes (called misdemeanors); offenses punishable by death or imprisonment in a state prison or penitentiary.

grand jury. A jury of inquiry called to hear the government make charges and present evidence in criminal cases to determine if a trial should be held. When the evidence warrants, the grand jury makes an indictment.

habeas corpus. A writ, or court order, requiring that a prisoner be brought before a judge to determine whether he is being held legally.

immunity. The protection given a witness against criminal prosecution in return for information.

indictment. A formal, written accusation of a crime drawn up by a grand jury after hearing the facts of the case.

information. A formal charge of the crime made by a law officer, usually the prosecuting attorney. He presents enough evidence against the accused to show that a trial should take place.

injunction. A writ, or court order, forbidding the defendant to do a threatened harmful act or directing him to stop such an act already in progress.

inquest. A judicial inquiry, usually held before a jury, to determine an issue of fact. One type of inquest is a coroner's inquest, an inquiry into the causes and circumstances of any death that occurs violently, suddenly, or suspiciously.

in re. "In the matter of" or "concerning," a term used to entitle a legal case or proceeding in which two parties do not oppose each other, or in which one person begins an action on his own behalf.

instructions to the jury. The advice or direction that the judge gives the jury on the law applicable to the case under consideration.

interlocutory ruling. A judgment or decree pronounced during the progress of a legal action and having only temporary or provisional force.

judicial review. The power or authority of the U.S. Supreme Court to interpret the Constitution, by reviewing and ruling on the constitutionality of orders issued by the President and of legislation passed by Congress and the states.

jurisdiction. The right to exercise authority in a given matter, such as the right of a court to hear and give judgment on a kind of legal action.

justices. Judges, judicial officials. The U.S. Supreme Court is composed of nine justices – the Chief Justice and eight Associate Justices.

justiciable. Proper for examination in and subject to the action of a court of justice.

larceny. The felonious stealing, theft, leading or riding away of personal property from the possession of another.

libelous per se. Written or printed words of such kind that when applied to a person they will necessarily cause injury to him in his personal, social, official, or business relations of life, so that legal injury may be presumed or implied from the bare fact of publication. 33 Am J1st L & S § 5. Written or printed words so obviously hurtful to the person aggrieved by them that no explanation of their meaning and no proof of their injurious character is required in order to make them actionable. Jerald v. Huston, 120 Kan 3, 242 P 472.

mandamus. A writ issued by a court ordering an official to carry out a specified official duty.

martial law. Overriding rule by state or military forces imposed upon a civilian population in time of war or critical public emergency when normal civil authority has failed to function.

misdemeanor. An offense, less serious than a felony, for which the punishment may be a fine or imprisonment in a local rather than a state institution.

nonjusticiable. Not proper for examination in nor subject to the action of a court of justice.

original jurisdiction. In law, the authority of a court to be the first to hear and decide certain kinds of cases.

overrule. To set aside; to reject. A judicial decision may be overruled by a later judgment on the same legal question – either by the same court or by a superior court. The later decision, not the earlier one, is then followed as a precedent.

parole. The release of a prisoner or detainee before his term has expired on condition of continued good behavior (post-incarceration).

perjury. The willful giving of false testimony while under oath in a judicial proceeding.

petit jury (trial jury). A group of citizens, usually twelve in number, selected by law and sworn to investigate certain questions of fact and to return a truthful verdict based on the evidence presented.

plaintiff. The party who initiates an action, or lawsuit, against another, who then becomes the defendant.

police powers. The general power, or authority, of state governments to protect the health, safety, morals, and welfare of their people. This power is based on the powers reserved to the states under the Tenth Amendment. To some extent, the federal government has evolved similar general powers, based on the Commerce Clause as well as on the Preamble to the U.S. Constitution.

prima facie. Legally valid and sufficient to establish a case unless disproved.

precedent. A judicial decision that may be used as a guide in deciding similar cases in the future.

probable cause. Reasonable ground to believe that a crime has been or will be committed, justifying the government's action in searching or arresting a suspect.

probable cause for a prosecution. A reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious, or as some courts put it, a prudent man, in believing that the party charged is guilty of the offense with which he is charged. The existence of such facts and circumstances would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged is guilty of the offense for which he is prosecuted. Such facts and circumstances, as, when communicated to the generality of men of ordinary and impartial minds, are sufficient to raise in them a belief of real, grave suspicion of the guilt of the person charged. 34 Am J1st Mal Pros § 47.

probable cause for arrest. A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. In substance, a reasonable ground for belief in guilt. Brinegar v. United States, 338 US 160, 93 L Ed 1879, 69 S Ct 1302, reh den 338 US 839, 94 L Ed 513, 70 S Ct 31.

probable cause for issuance of a search warrant. A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a prudent and cautious man in the belief that the person accused is guilty of the offense with which he is charged. 47 Am J1st Search § 22.

probation. A suspended sentence for a minor crime in which the person convicted can go free – provided his behavior remains good. Normally, he is placed under the supervision of a probation officer. (pre-incarceration).

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prosecuting attorney. The lawyer who conducts the government's case against a person accused of a crime. He is often called the district attorney or the state's attorney.

public defender. An attorney-at-law appointed to aid a person accused of crime or taken into custody as delinquent who cannot afford a lawyer, acting as counsel to the same degree as if he/she had been retained by the accused person in the case.

quash. To put an end to, set aside, or make void, especially by judicial action (such as to quash a subpoena or an indictment).

recidivism. The relapse into crime and return to prison of one who has been previously convicted and punished for a crime.

robbery. The felonious taking of money or goods of value from the person of another or in his presence, against his will, by force or by putting him in fear.

search and seizure. Means for the detection and punishment of crime; the search for and taking custody of property unlawfully obtained or unlawfully held, such as stolen goods, property forfeited for violation of the law, and property the use or possession of which is prohibited by law, and the discovery and taking into legal custody of books, papers, and other things constituting or containing evidence of crime.

search warrant. A form of criminal process which may be invoked only in furtherance of a public prosecution. An order in writing, in the name of the people, the state, or the commonwealth, according to the local practice, signed by a magistrate, and directed to a peace officer, commanding him to search for personal property and bring it before a magistrate. 47 Am J1st Search § 3. An examination or inspection, by authority of law, of one's premises or person, with a view to the discovery of stolen, contraband, or illicit property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. 47 Am J1st Search § 4.

self-incrimination. Testimony or other evidence given by a person, which tends to expose him to prosecution for a crime.

sentence. In criminal proceedings, the formal judgment in which a judge states the penalty or punishment for a defendant who has been convicted of a crime.

stare decisis. The doctrine under which courts decide cases on the basis of precedents – rules established in previous similar cases.

subpoena. A writ commanding a person designated in it to appear in court for testifying as a witness, or to produce in court certain designated documents or other evidence.

trial by jury. A trial in which the jurors are the judges of the facts and the court is the judge of the law.

verdict. The formal decision of a jury regarding the facts of a legal case submitted to it at a trial.

waiver. The voluntary surrender of one's legal rights.

warrant. An order issued by a judge or other authority, directing a law officer to carry out an action, such as an arrest or a search.

writ. A written order from a court, commanding or prohibiting a specified act.

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A. HUMAN AND ORGANIZATIONAL RESOURCES

A list of the names, addresses and telephone numbers of key resource people is important in legal education. Students can develop such a list as part of a classroom assignment from which they can determine the individuals to contact by telephone or letter for classroom presentation or for specific information. The official State telephone directory is most helpful.

A list might be organized in the following manner:

Position or Organization	Name	Address	Telephone
State Bar Association Representative			
Local Police Chief			
Attorney General			
State or Local American Civil Liberties Union			
Public Defender's Office			
Consumer Protection Agency			
Department of Corrections and Parole			
Judges – Juvenile Court – Municipal Court – Superior Court			
Office of Probation			
Legal Services Office			
Broadcasters Association			
Press Association			
Criminal Justice Commission			
Others			

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B. ADDITIONAL CASES

"FREE SPEECH AND YOUTH"

CASE REFERENCES

1. *Feiner* v. *New York*, 340 U.S. 315 (1951)

Feiner, from a wooden box on a street corner, was addressing a crowd of about 80 people, both black and white. During the speech he made derogatory remarks about several political officials and called upon Blacks to demand their rights.

Terminiello v. *City of Chicago*, 337 U.S. 1 (1949)

Terminiello, a suspended Catholic priest, addressed a public meeting during which he attacked "Communistic Zionistic Jews." A crowd gathered outside the auditorium to protest the meeting.

2. *Talley* v. *California*, 362 U.S. 60 (1960)

Talley passed out handbills urging readers to boycott certain merchants and businessmen who carried products of manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals."

Scoville v. *Board of Education of Joliet*, 425 F. 2d 10 (1970)

A group of high school students were expelled for selling a literary magazine highly critical of the school.

3. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949)

A city ordinance made it unlawful for sound trucks emitting "loud and raucous" noises to be operated on the streets.

Wisconsin Student Association v. *University of Wisconsin Regents* 39 L.S. 2259 (1970)

A state statute made it unlawful for any person to utilize sound-amplifying equipment in a state institution of higher learning without the permission of the administrative head of the institution.

4. *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950)

The Progressive Citizens of America picketed a grocery store in support of its demand for more black personnel.

Cox v. *Louisiana*, 379 U.S. 536 (1965)

Reverend Cox, the leader of a civil rights demonstration, was charged with several offenses including disturbing the peace, obstructing public passages, and picketing before a courthouse.

5. *Kunz* v. *New York*, 340 U.S. 290 (1951)

Kunz received a permit to hold public worship meetings but it was revoked after evidence was presented that he had ridiculed and denounced other religious beliefs at his meetings. His subsequent applications for another permit were denied.

Stacy v. *Williams*, 306 F. Supp. 963 (1969)

Students questioned the constitutionality of regulations for off-campus speakers at state colleges and universities.

6. *Zucker* v. *Panitz*, 299 F. Supp. 102 (1969)

Students wanted to place an ad in their school paper to express their opposition to the Vietnam War.

7. *Barker* v. *Hardway*, 283 F. Supp. 228 (1967)

A group of students demonstrated at a football game against the racist and authoritarian practices at the school.

8. *Brown* v. *Louisiana*, 383 U.S. 131 (1966)

Blacks were not allowed to use the reading room in a public library. A group of blacks entered the library, asked for a book, and then went to the reading room and refuse to leave.

9. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943)

Pupils in public schools refused to participate in the ceremony of saluting the national flag.

10. *Breen* v. *Kahl*, 419 F. 2d 1034 (1969) and *Richards* v. *Thurston*, 424 F. 2d 1285 (1970)

Students were suspended because of the length of their hair.

11. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969)

Several students were suspended for wearing a black armband to school in protest of the Vietnam War in violation of a school regulation forbidding such action.

12. *Street* v. *New York*, 394 U.S. 576 (1969)

Street, after hearing about the shooting of James Meredith, took an American flag to a street corner and burned it.

United States v. *O'Brien*, 391 U.S. 367 (1967)

O'Brien burned his draft card in protest of the war in Vietnam.

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Adler v. Board of Education
342 U.S. 485 (1952)
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Avery v. Midland
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381 U.S. 532 (1965)
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340 U.S. 315 (1951)
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392 U.S. 83 (1968)
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D. AUDIO/VISUALS

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A Matter of Conscience. (28 minutes, black and white) Film Associates, Los Angeles, California.
Documents the personal struggles of two young Americans in open rebellion against the war and draft. It explores the philosophy of non-violence.

Basic Court Procedures. (black and white, color 13-1/2 minutes) Coronet Films.
Explains the function and legal processes of the judicial system in a democracy.

Backgrounds for Understanding the Judiciary. (black and white) Coronet Films.
Describes the role of the courts in government and their importance to a democratic society.

The Bill of Rights in Action: Story of a Trial. (color, 22 minutes) Bailey-Film Associates.
Due process of law is demonstrated in the arrest and trial of two young men accused of a misdemeanor.

The Bill of Rights in Action: Freedom of Speech. (color, 21 minutes) Bailey-Film Associates.
Challenges students to balance an individual's expression of unpopular views against society's need for order.

The Bill of Rights of the United States. (black and white, color, 20 minutes) Encyclopaedia Britannica.
Traces the historical developments which ultimately led to the adoption of the first ten amendments.

Bill of Rights Series. (color) International Film Bureau.
Discusses the events and developments which made the first ten amendments necessary and which require their continued enforcement today. Individual titles are: *The First Amendment; The Fourth Amendment; The Fifth Amendment; The Sixth Amendment; The Eighth Amendment.*

Changing the Law. (color 23 minutes) Bailey-Film Associates.
Explores the dynamic nature of our legal system and shows the advantages of changing laws by peaceful rather than violent means.

Debt to the Past – Government and Law. (color, 16 minutes) Moody Institute of Science.
Describes the origins and development of our systems of constitutional government and law.

Decision for Justice: John Marshall. (black and white, 20 minutes) Teaching Film Custodians.
The Chief Justice's decision in the *Marbury* case establishes the authority of the Supreme Court to decide on the constitutionality of congressional legislation.

Decision, The Constitution in Action. (series title) (black and white, 29 minutes each) NET.
Contemporary film clips examine the activities of the Supreme Court on a number of key issues. *The Constitution and Censorship* deals with censorship of motion pictures and of printed matter; *The Constitution and Employment Standards* examines *U.S. vs. Darby Lumber* in the light of federal attempts to regulate wages and hours; *The Constitution and Fair Procedure* deals with the rights of the accused, especially as defined in *Levra vs. Denno; The Constitution and Labor Unions* traces the right to work laws, centering on *Whittaker vs. North Carolina; The Constitution and Military Power* examines the Korematsu case; *The Constitution: Whose Interpretation?* deals with conflicts of jurisdiction within the federal government, especially during FDR's presidency.

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Due Process of Law. (21 minutes, color) Film Associates, Los Angeles, California.
In the setting of a hearing to reinstate a student who has been summarily suspended after an act of violence during a campus demonstration, questions are raised regarding due process and the values surrounding it. Open-ended.

Freedom of Expression: The Feiner Case. (color, 30 minutes) Encyclopaedia Britannica.
The Supreme Court rules in favor of a young college student arrested and convicted of violating a disorderly conduct ordinance when he used public property to voice his private views.

Freedom of the Press – Today. (color, sound, 2 parts) Guidance Associates.
Examines freedom of the press in the light of government control, military censorship, and a recent Supreme Court decision.

Freedom of Speech. (21 minutes, color) Film Associates, Los Angeles, California.
This film follows the case of an unpopular speaker who is convicted of disturbing the peace. Lawyers argue the constitutional issue before a court of appeals. Open-ended.

The Fight for Our Rights. (color, sound) Warren Schloat Productions.
Documents the changing interpretations applied to eight of the freedoms covered by constitutional amendments. Titles in Set One are: *Freedom of the Press; Freedom of Religion; The Right of Peaceful Assembly.* Titles in Set Two are: *Freedom of Speech; The Right to Bear Arms; The Right to Counsel.*

Hard Labor for Life – The Court at Work. (black and white, 30 minutes) Encyclopaedia Britannica.
Describes the work of the Supreme Court and the experience required of justices.

Interrogation and Counsel – Bill of Rights Series. (22 minutes, color) Film Associates, Los Angeles California.
These films deal with specific amendments in the Bill of Rights. In each film the conflict is made immediate by interviews with critics and supporters of recent Supreme Court rulings, with students, police, and people who feel they have suffered injustices. The films present a dramatic episode with provision to stop the projector for discussion between sequences. A very good series.

Justice. (black and white, 30 minutes) State Bar of Michigan.
Discusses the problems of justice and law, and dinstinguishes between justice in general and what is justice in a specific case.

Justice Black and the Bill of Rights. (32 minutes, color) Film Associates, Los Angeles, California.
Associate Justice Hugh M. Black of the Supreme Court is interviewed and discusses possible conflicts between constitutional law and morality, freedom of speech, and police powers versus the rights of the accused.

Justice, Liberty and Law – Bill of Rights Series. (20 minutes, color) Film Associates, Los Angeles, California.
An introduction to one of the conflicts of a free society: how our government is to enforce order while providing justice and a maximum of freedom to the individual. The film sets the Bill of Rights in an historical perspective and provides an introduction to the other films in the series.

The Justice of Law. (black and white, 29 minutes) Indiana University.
Defines laws, just laws, equal protection, and natural law.

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Justice Under Law: The Gideon Case. (black and white, color, 23 minutes) Encyclopaedia Britannica.
Traces this case from the arrest of Clarence Gideon to the landmark Supreme Court decision which interpreted the Constitution as guaranteeing the right of free counsel to indigent persons accused of serious crimes.

The Making of Law. (black and white, 29 minutes) Indiana University.
Deals with the need for law, various kinds of law, and problems of enforcement and interpretation.

Mightier Than the Sword: Zenger and Freedom of the Press. (black and white, 23 minutes) Teaching Film Custodians.
Describes the famous case which established the principle that publishing the truth is not libel.

The Nature of Law. (black and white, 29 minutes) Indiana University.
Explains civil and criminal law and gives various views on the role of law in society.

The Nature and Scope of Judicial Power. (black and white, 30 minutes) Encyclopaedia Britannica.
Reviews the judicial powers of the Supreme Court.

Police Unit. (20 minutes, black and white) Film Associates, Los Angeles, California.
Viewers accompany a police team on a daily routine tour of duty.

Price of Freedom. (black and white, 22 minutes) National Association of Manufacturers.
Emphasizes the important role of a free press in maintaining and fostering a democratic society.

Right to Be Let Alone: The Mapp Case. (color 30 minutes) Encyclopaedia Britannica.
Discusses searches and seizures, and whether evidence found in an illegal search and seizure is admissible in a state court as well as in a federal court.

Right to Counsel: The Gideon Case. (color, 30 minutes) Encyclopaedia Britannica.
Describes Gideon's single-handed fight to require a state court to appoint counsel to represent indigent defendants accused of serious crimes.

Right to Legal Counsel. (color, 14 minutes) Bailey-Film Associates.
Discusses the *Gideon v. Wainwright* case and the 1963 Supreme Court decision stating that indigent defendants accused of serious crimes must be offered counsel.

Right to Privacy. (25 minutes, color) Film Associates, Los Angeles, California.
Electronic surveillance by the police results in the issuance of a search warrant. The film concerns a pre-trial hearing on a motion to suppress the evidence. Open-ended.

Right to Remain Silent: The Miranda Case. (color, 30 minutes) Encyclopaedia Britannica.
Presents the case on which the Supreme Court based its decision that unless an individual taken into custody is informed prior to questioning of his right to remain silent, any evidence obtained as a result of interrogation cannot be used against him.

Search and Privacy – Bill of Rights Series. (22 minutes, color) Film Associates, Los Angeles, California.

Speech and Protest – Bill of Rights Series. (22 minutes, color) Film Associates, Los Angeles, California.

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Search and Seizure. (black and white, 30 minutes) State Bar of Michigan.
Describes the development of search and seizure legislation since *Mapp v. Ohio* (1961).

The Supreme Court. (black and white, color, 11 minutes) Coronet Films.
Follows a case from its inception, through the lower courts, to its final hearing before the Supreme Court.

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The Changing Role of the Supreme Court. (Washington Tapes). Doubleday & Co., Inc.
Reps. William Cramer and Robert Kastenmeir discuss the separation of powers among the branches of the federal government, and debate the question of the Supreme Court's assumption of legislative powers.

The Supreme Court – Court of Last Resort. (Washington Tapes). Doubleday & Co., Inc.
Associate Justice Potter Stewart describes the role and powers of the Supreme Court. Also covers how a Justice reaches his individual decision, qualifications of a Supreme Court Justice, and the increasing importance of the high court.

Trial By Jury, Parts One and Two. (National Tape Repository).
A district court judge explains the intricacies of trial by jury.

When Men Are Free (series title). (15 minutes each) National Tape Repository.
These tapes analyze the basic freedoms, rights, and responsibilities of an American citizen.

Plessy v. Ferguson (1896). Enrichment Teaching.
The case which gave the high courts sanction to the "separate but equal" principle, and which was overturned in 1954.

E. CREDITS

Permission has been granted from the following sources to reprint portions of the material contained in the following entries. The Institute for Political and Legal Education recommends the purchase of these materials as an excellent educational supplement to *Individual Rights.*

Ballantine, James A. *Ballentine's Law Dictionary.* (c) 1969 by The Lawyers Co-Operative Publishing Company.

Cardoza, Benjamin N. *The Nature of the Judicial Process.* (c) 1949 by Yale University Press Text obtainable from: Yale University Press, 92A Yale Station, New Haven, Connecticut.

Clark, Todd. *Police Patrol.* (c) 1973 by SIMILE II. Manual/Game obtainable from: SIMILE II, 1150 Silverado, La Jolla, California 92037.

Gillers, Stephen. *Getting Justice.* (c) 1971 by Basic Books, Inc., Publishers. Text obtainable from: Basic Books, 10 East 53rd Street, New York, New York 10012.

High School Law Program Attorney's Source Book. (c) 1973 by Law and American Youth Committee, Young Lawyers Section, American Bar Association. (Permission granted by Jeffrey L. Dow, Esq.).

Lockhart, William (ed.). *The American Constitution: Cases-Comments-Questions.* (c) 1970 Lockhart, Kamisar, and Choper by West Publishing Company, St. Paul, Minnesota.

Starr, Isidore. *The Supreme Court and Contemporary Issues.* (c) 1969 by Encyclopaedia Britannica Educational Corporation. (Permission granted by author.)

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